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No. 78-1455

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-51a) is reported at 587 F.2d 284. An earlier opinion of the court of appeals (App. D, *infra*, 56a-58a) is not reported, although the judgment order in that case is reported at 559 F.2d 1222 (table). The opinions of the district court (Apps. E and F, *infra*, 59a-74a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 52a-53a) was entered on November 1, 1978. A timely petition for rehearing was denied on January 17, 1979 (App. C, *infra*, 54a-55a). On February 7, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including March 18, 1979 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Federal Rule of Evidence 501 encompasses a common-law "legislative privilege," coextensive with the Speech or Debate Clause of the Constitution, that prohibits the federal government from inquiring into the legislative acts of a state legislator in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Speech or Debate Clause of the United States Constitution, Article I, Section 6, clause 1, provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT

On August 12, 1976, respondent, then a Tennessee state senator, was indicted in the United States District Court for the Western District of Tennessee on five counts of obtaining money under color of official right (18 U.S.C. 1951), one count of using an in-

terstate facility to distribute a bribe (18 U.S.C. 1952), and one count of participating in an enterprise through a pattern of racketeering activity (18 U.S.C. 1962). The indictment was based on respondent's alleged abuse of his legislative position to extract money from victims in two separate schemes—the first to prevent the extradition of a Tennessee prisoner to Illinois, the second to procure master electrician's licenses for four individuals (App. A, *infra*, 3a-4a).

Before trial, respondent moved to suppress evidence of his legislative acts performed in connection with the alleged extortion schemes. Respondent claimed that a common-law privilege for state legislators, equivalent in scope to the protection afforded federal congressmen under the Speech or Debate Clause, precludes the federal government from introducing any evidence of "legislative acts or motivation therefor" in a federal criminal trial (App. E, *infra*, 59a). The district court granted the motion, holding that a common law privilege akin to the Speech or Debate Clause privilege exists under Rule 501 of the Federal Rules of Evidence. The court stated that such a legislative privilege is necessary "to protect the integrity of the [state] legislative process by insuring the independence of individual legislators * * * [and] to preserve the constitutional relation between our federal and state governments in our federal system" (App. F, *infra*, 73a).

The government appealed, and the court of appeals vacated the district court's blanket ruling

and remanded for a more specific finding with regard to particular items of the government's proposed case (App. D, *infra*, 56a-58a). On remand, the government tendered an offer of proof setting forth with specificity the categories of evidence to be used at trial (App. A, *infra*, 39a-51a). The district judge again granted respondent's renewed motion to suppress, except for a few limited items such as the fact that respondent was a state senator, and a general explanation of the operation of the bicameral legislature of Tennessee (App. E, *infra*, 59a-64a).

Thereafter, the government prosecuted a second appeal. A divided court of appeals held that a legislative privilege exists under Rule 501, but that the district court had construed that privilege too broadly with regard to certain kinds of evidence.[1] In reaching its conclusion, the court initially stated (as the parties had previously conceded) that neither the

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[1] The court of appeals substantially affirmed the district court's rulings with regard to the inadmissibility of such matters as respondent's introduction of a bill or his official request for an opinion of the state attorney general. However, relying on this Court's pertinent Speech or Debate Clause decisions, the court of appeals held admissible (1) an opinion of the Tennessee Attorney General regarding the extradition of one of respondent's alleged victims, rendered at respondent's request, (2) tapes and testimony concerning conversations between respondent and his alleged victims, and (3) the governor's veto message with regard to an act sponsored by respondent (App. A, *infra*, 16a-26a). For purposes of this petition, we assume *arguendo* that if a legislative privilege exists, the court of appeals applied it correctly to the proffered evidence.

Tennessee constitutional legislative privilege[2] nor the Speech or Debate Clause directly applies to a federal prosecution of a state legislature (App. A, *infra*, 2a-3a). The court also noted that this Court has never passed upon the existence of a common-law legislative privilege, and, indeed, that two other courts of appeals had squarely held that Rule 501 does not encompass such a privilege (*id.* at 15a). Nonetheless, the court concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases [of the Supreme Court]" justify recognition of a common-law legislative privilege in the context of a federal criminal prosecution (*ibid.*).[3]

Judge Weick dissented, arguing that "the federal courts ought not to innovate and create a new privilege for the protection of state legislators who violate the criminal laws of the United States" (App. A, *infra*, 26a-27a). Judge Weick explained that because the speech or debate privilege emerged as a means of

[2] Article II, Section 13 of the Tennessee Constitution provides that:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[3] In particular, the court cited *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *United States* v. *Brewster*, 408 U.S. 501 (1972).

ensuring the independence of coordinate branches of the same government, the doctrine of separation of powers does not justify extending the privilege to the context of federal prosecutions of state legislators (*id.* at 31a-33a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question under Rule 501 of the Federal Rules of Evidence concerning whether a common-law legislative privilege precludes the federal government from introducing evidence of legislative acts at the criminal trial of a state legislator. As the court below expressly recognized (App. A, *infra*, 15a), its decision squarely conflicts with the decisions of two other courts of appeals. See *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), cert. denied, 425 U.S. 973 (1976), rev'd, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976); *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978). Moreover, the analysis of the court of appeals appears inconsistent with the relevant precedents of this Court. Because of these conflicts and because the creation of a common-law legislative privilege will substantially impair the federal government's ability to prosecute venal state legislators under various federal statutes,[4] review of this case by the Court is warranted.

[4] Here, of course, respondent was charged with violating the Hobbs Act, 18 U.S.C. 1951; the Travel Act, 18 U.S.C. 1952; and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962. The federal government has also prose-

1. In *United States* v. *Craig*, *supra*, a divided panel of the Seventh Circuit held that a common-law legislative privilege exists under Rule 501, but that the defendant state legislator had waived his privilege by testifying before the grand jury. 528 F.2d at 776-781. Judge Tone, in a concurring opinion, reasoned that no such privilege exists in the context of a federal prosecution of a state legislator. Judge Tone first pointed out that neither the Illinois nor the federal Speech or Debate Clause was implicated by a federal prosecution of a state legislator. *Id.* at 781-782. Next, primarily relying on *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), he noted that "common-law official immunity has not been extended to criminal liability." 528 F.2d at 728. Finally, the concurrence rejected the majority's assumption that such a privilege was justified by the doctrine of separation of powers. In this regard, Judge Tone stated that separation-of-powers principle applies to the relationship between coordinate branches of a single government but not to the federal prosecution of a corrupt state legislator. *Id.* at 783.

Subsequently, the Seventh Circuit granted the government's petition for rehearing en banc. By a 5-to-3 vote, the court of appeals adopted Judge Tone's opinion as the decision of the en banc court. Thereafter the First Circuit also refused to recognize a common-law legislative privilege under Rule 501.

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cuted state legislators under the mail fraud and wire fraud statutes, 18 U.S.C. 1341 and 1343. See, *e.g.*, *United States* v. *Craig*, *supra*, 528 F.2d at 774.

See *United States* v. *DiCarlo*, *supra*.[5] Thus, as a result of the decision below, a conflict with serious implications for the administration of the federal criminal laws exists among the courts of appeals. That conflict should be resolved by the Court.

2. Although this Court has never passed on the precise question presented here, various decisions strongly suggest that the court of appeals erred in holding that a federal common-law privilege cognizable under Rule 501 precludes the federal prosecutor from introducing highly probative evidence of respondent's extortion schemes at trial. Before turning to discuss these cases, we first note—as respondent has conceded—that neither the Speech or Debate Clause of the United States Constitution nor the similar privilege contained in the Tennessee Constitution (see note 2, *supra*) afford respondent any surcease in this case (App. A, *infra*, 3a). The former provision applies only to federal legislators, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, No. 77-1327 (March 5, 1979), slip op. 12; *United States* v. *DiCarlo*, *supra*, 565 F.2d at 805; *In re Grand Jury Proceedings*, 563 F.2d 577, 580-581 (3d Cir. 1977); *United States* v. *Craig*, *supra*, 528 F.2d at 782; see also *United States* v. *Brewster*, 408 U.S. 501, 516 n.10 (1972), and, given the express terms of Rule 501 and the Supremacy Clause, it is

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[5] In the interim, the Third Circuit in dictum stated that a somewhat circumscribed privilege exists. See *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977). Judge Gibbons filed a concurring opinion rejecting that dictum. *Id.* at 586-588.

clear that the existence of a state constitutional privilege is not determinative of the admissibility of evidence in a federal criminal proceeding. *In re Grand Jury Proceedings, supra,* 563 F.2d at 582; H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 7 (1974); 2 *Weinstein's Evidence* ¶ 501[03], at 501-24 to 501-25 (1977). See also Fed. R. Evid. 402; *Ker* v. *California,* 374 U.S. 23, 31-32 (1963); *Elkins* v. *United States,* 364 U.S. 206, 223-224 (1960); *Wolfle* v. *United States,* 291 U.S. 7, 12-13 (1934).

a. In concluding that federal common law "interpreted * * * in the light of reason and experience" (Fed. R. Evid. 501) dictates recognition of a legislative privilege, the court of appeals relied heavily on this Court's decision in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). In that case, the Court held that a state legislator had an absolute official immunity from civil liability under the federal civil rights acts. But, as this Court has often stated, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *.'" *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974), quoting from *Gravel* v. *United States,* 408 U.S. 606, 627 (1972). See also *Stump* v. *Sparkman,* 435 U.S. 349, 356 (1978); *Imbler* v. *Pachtman,* 424 U.S. 409, 428-429 (1976). Indeed, such civil immunities have been "recognized at least partly because the availability of criminal sanctions * * * affords alternative protections [against corrupt state legislators]." *In re Grand Jury Proceedings, supra,* 563 F.2d at 587 (Gibbons, J., concurring).[6]

b. Nor does the doctrine of separation of powers, which informs the Speech or Debate Clause, support the result reached below. "The Speech or Debate Clause was designed to assure a co-equal branch of the [federal] government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra,* 408 U.S. at 616. A state legislator is simply not a part of a "co-equal branch of the government," and his prosecution for violations of federal law by federal authorities clearly effectuates Congress' intent in enacting those laws. In short, "the separation-of-powers principle * * * has no applicability to the federal [government's] relationship to the States." *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976) (plurality opinion of Brennan, J.).[7]

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[6] Even with regard to civil matters, the protection afforded state legislators by the doctrine of official immunity appears to fall short of that accorded federal legislators by the Speech or Debate Clause. Compare *Bond* v. *Floyd,* 385 U.S. 116 (1966), and *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963) (injunction lies against state legislator) with *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), and *Powell* v. *McCormack,* 395 U.S. 486, 501-506 (1969) (Speech or Debate Clause precludes injunctive relief against legislative acts of Congressmen).

[7] Neither does the federal government's prosecution of a corrupt state legislator implicate the Tenth Amendment concerns reflected in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). In that case, the federal government un-

c. The decision of the court of appeals also ignores the well-established principle disfavoring the creation or extension of evidentiary privileges. As explained in *United States* v. *Nixon*, 418 U.S. 683, 710 (1974) (footnote omitted): "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Accord, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 690 n.29 (1972); 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. 1961). And here, policy and precedent strongly indicate that the recognition of a common-law legislative privilege would be unreasonable and unwise. The federal prosecution of state legislators for federal crimes does not undermine the internal balance and separation of powers within the state government. Rather, it preserves the authority of the federal government, established in the Supremacy Clause of the Constitution, to protect the federal interests inherent in the federal criminal code. Moreover, the creation of a legislative privilege in the context of federal criminal prosecutions would blur the distinction purposefully drawn by the Court between federal criminal liability and federal civil liability[8] without appreciably protecting the independence of state legislators. *United States* v. *DiCarlo*, *supra*, 565 F.2d at 806; *In re Grand Jury Proceedings*, *supra*, 563 F.2d at 587 (Gibbons, J., concurring).

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constitutionally interfered with the essential functions of the state-qua-state. Here, the federal government is prosecuting a state legislator for extortion and other acts that undoubtedly violate state as well as federal law.

[8] See *Imbler* v. *Pachtman supra*, 424 U.S. at 428-429; *O'Shea* v. *Littleton*, *supra*, 414 U.S. at 503.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Tennessee,
Western Division.

Decided and Filed November 1, 1978.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

EDWARDS, Circuit Judge, delivered the opinion of the Court, in which ENGEL, Circuit Judge, joined. WEICK, Circuit Judge, (pp. 21-31) filed a separate dissenting opinion.

EDWARDS, Circuit Judge. The question posed by this case is whether a federally indicted Tennessee State Senator is entitled to the protection of a common law speech or debate privilege as to his legislative acts. The issue requires an examination of a good deal of ancient history.

In 1689, after nearly two centuries of struggle between the English monarchy and the English Parliament, the English Bill of Rights was wrung by Parliament from newly crowned monarchs. It declared

"that the Freedom of Speech and Debate or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." [1] It was the Constitution of the United States by adoption of the Bill of Rights in 1789 which first provided an enforceable guarantee of freedom of speech for all persons. But previously in 1787 the original Constitution (and the Articles of Confederation before it [2]) had enacted freedom of speech rights for members of Congress in the discharge of their official duties. Article I, § 6 of the United States Constitution provided (and provides) "any Speech or Debate in either House . . . shall not be questioned in any other Place."

Three states in 1787 had already adopted similar protections for their legislators. By now 43 states, including Tennessee, provide such constitutional protection for the legislative process. The working of the Tennessee Constitutional guarantee is:

> *Privilege of members.*—Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either

[1] 1 W. & M., Sess. 1, c. 2.

[2] Article V of the Articles of Confederation provided:

"freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."

> House, they shall not be questioned in any other place.

TENN. CONST. art. II, § 13.

All parties to this litigation concede, however, that neither provision quoted above from either the United States or the Tennessee Constitutions is directly applicable to the instant prosecution. This indictment is laid under a federal statute which prohibits "extortion . . . under color of official right." Hobbs Act, 18 U.S.C. § 1951 (1976).[3] The Tennessee Constitution cannot provide any specific protection to this state legislator in this case because of the supremacy clause in the federal constitution, art. VI, clause 2. Of course, the United States Constitution's provision does not apply directly, since appellee is not a member of either house of the United States Congress.

The question which remains is whether a federal common law privilege for state legislators essentially equivalent to the provisions contained in the English Bill of Rights and the United States and Tennessee Constitutions should be recognized by the federal courts in admitting evidence in a Hobbs Act case. If so, there is a second and less important question pertaining to the scope of the privilege to be applied in this case.

THE FACTS

The seven-count indictment against Tennessee State Senator Edgar H. Gillock charged him with 1) pro-

[3] Other counts charged Gillock with violating 18 U.S.C. §§ 1952 and 1962 (1976).

curing and agreeing to accept a bribe "under color of official right" for using his official office to prevent the extradition of one James Williams from Tennessee to Illinois; 2) attempting to obtain $5,000 apiece from four named individuals for using his office to attempt to procure for them master electrician's licenses, and 3) being engaged in the racketeering enterprises referred to, in violation of TCA § 39-802 which prohibits a member of the Tennessee legislature from agreeing to accept anything of value for exercising the discretion of the public office which he holds.

This case has been the subject of numerous motions and proceedings in the United States District Court for the Western District of Tennessee. In those proceedings defendant Gillock moved to dismiss the indictment and to suppress all the evidence concerning his legislative activities. The District Court denied motions to dismiss the indictment, but granted motions to exclude much of the evidence, holding that, as state senator, defendant Gillock had an evidentiary speech or debate privilege under Rule 501 of the Federal Rules of Evidence.

The government then appealed to this court under 18 U.S.C. § 3731 (1976), and this court remanded for the writing of a more particularized record of the evidence to be dealt with. In the District Court the government filed a detailed offer of proof which we have reproduced as an Appendix to this opinion. The District Judge then made detailed rulings thereon, and on the same grounds, suppressed many items in

the offer of proof. The government then brought the instant appeal under 18 U.S.C. § 3731 (1976).

THE PRIVILEGE

The basic question, as the District Judge recognized, is whether or not defendant Gillock is entitled to a common-law speech or debate privilege. Although the question has divided the Circuit Courts and has never been passed on by the Supreme Court, we hold that he is so entitled, albeit we would describe its limits somewhat more narrowly than did the District Judge.

The long history of the legislative speech or debate clauses which we have described at the beginning of this opinion forms the background of our decision. The government's brief seems to suggest that there is no need for such protection of legislative branches of government (whether national or state) when the powers of government are divided (as in the United States and Tennessee Constitutions) between three co-equal bodies—the Executive, the Legislative and the Judiciary. This argument would have more appeal if American history demonstrated that no national or state executive had ever reached for power so as to infringe upon the rights of a legislative branch. From the beginning of the history of the United States to very recent years, however, there have been recurrent conflicts over power which have brought the President and Congress (to say nothing of Governors and Legislatures) into grave conflict.

It is easy to conceive of the abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion.

The problem of this case is not constitutional immunity. No constitutional protection applies to defendant Gillock in this federal prosecution. What is at issue is his claim, upheld by the District Judge, that evidence concerning his legislative acts should be suppressed because they are protected by a common-law privilege.

Chief Judge Bailey Brown who conducted the hearings and entered the suppression order from which this appeal is taken reasoned as follows:

> We conclude that, under Rule 501 of the Rules of Evidence, defendant has a speech or debate privilege with respect to, but only with respect to, his legislative acts and motivation therefor because we believe that such is required, as stated in the Rule, "by the principles of the common law" as they are interpreted "in the light of reason and experience." The reasons for the conclusion are these. The privilege is necessary, to paraphrase Chief Justice Burger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. To the extent that venal legislators might go unconvicted because of the government's being barred from proving legislative acts and motives, this is the price that the Founding Fathers believed we have to pay for legislative independence. Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

We believe that under the historical background we have recited above, Rule 501 of the Federal Rules of Evidence authorized Judge Brown (and authorizes and requires us) to find and protect a speech or debate privilege. Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

We have indicated above that lessons "of reason and experience" have motivated recognition of legislative speech or debate immunity or privilege in 43 of the 50 states and in the English Bill of Rights, the Articles of Confederation of the United States, as well as the United States Constitution.

While the United States Supreme Court has never passed upon the precise problem which we face, it has recognized the immunity from civil suit of a state legislator on reasoning which we think applicable to this case:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St. Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale* v. *Hansard*, 9 Ad. & El. 1, 113-114 (1839).
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill

> of Rights: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Article I, § 6, of the Constitution provides: ". . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."
>
> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.
>
> *Tenney* v. *Brandhove*, 341 U.S. 367, 372-73 (1951).

In the fundamental case dealing with the protection granted by the United States Constitution's provision for protection of speech or debate, the Supreme Court, through Chief Justice Burger said:

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legis-

lative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States* v. *Johnson*, 383 U.S. 169 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

> "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Id.*, at 178 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the Legislative Branch to acknowledge that our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the 17th and 18th century English kings, without meaningful recourse to a writ of habeas corpus. In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.

(a) In *United States* v. *Johnson, supra*, the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. § 281 (1964 ed.), and on one count of conspiracy to defraud the United States, 18 U.S.C. § 371. The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, 383 U.S., at 183, cited the oft-quoted passage of Mr. Justice Lush in *Ex parte Wason*, L. R. 4 Q. B. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House.*" *Id.*, at 577 (emphasis added).

In *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. This statement, too, was cited with approval in *Johnson*, 383 U.S., at 179. Our conclusion in *Johnson* was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.*, at 185.

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy-to-defraud count alleged an agreement among Representative Johnson and three co-defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, the Government claimed Johnson was paid a bribe. At the trial, the Government questioned Johnson extensively, relative to the conspiracy-to-defraud count, concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it de-

pended on inquiries into speeches made in the House.

United States v. *Brewster*, 408 U.S. 501, 507-10 (1971). (Footnotes omitted.)

In *United States* v. *Johnson*, 383 U.S. 169 (1965), Justice Harlan said for the Court:

> In *Tenney* v. *Brandhove*, 341 U.S. 367, at issue was whether legislative privilege protected a member of the California Legislature against a suit brought under the Civil Rights statute, 8 U.S.C. §§ 43, 47(3) (1946 ed.), alleging that the legislator had used his official forum "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances . . . ." 341 U.S., at 371. The Court held a dismissal of the suit proper; it viewed the state legislative privilege as being on a parity with the similar federal privilege, and concluded that
>
> > "The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Flecher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S., at 377.

III.

Kilbourn and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes; neither case deals, however, with a criminal prosecution based upon an allegation

> that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests. However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions.
>
> *United States* v. *Johnson*, *supra* at 179-80.

In the most recent Supreme Court case dealing with the Speech or Debate Clause, Chief Justice Burger said:

> The Clause is a product of the English experience. *Kilbourn* v. *Thompson*, *supra*; *United States* v. *Johnson*, *supra*, at 177-179. Due to that heritage our cases make it clear that the "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966)," *Gravel* v. *United States*, *supra*, at 617. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . . ." *United States* v. *Brewster*, *supra*, at 508. Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as

> those initiated by the Executive Branch. *Kilbourn* v. *Thompson*, *supra*; *Tenney* v. *Brandhove*, *supra*; *Doe* v. *McMillan*, *supra*; *Dombrowski* v. *Eastland*, *supra*.
>
> *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975).

See also Doe v. *McMillan*, 412 U.S. 306, 311 (1973); *Dombrowski* v. *Eastland*, 387 U.S. 82, 84 (1967).

By citing these Supreme Court cases, we do not suggest that any one of them supplies precisely controlling law as to our present case.

The Courts of Appeals do supply well-argued opinions on both sides of the general question we confront here: *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976), *cert. denied* 425 U.S. 973 (1976) [*Craig I*]; *United States* v. *Craig*, 537 F.2d 957 (7th Cir. 1976) (en banc) [*Craig II*], *cert. denied sub nom. Market* v. *United States*, 429 U.S. 999 (1976); *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977); *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977).

While we respect the views of the judges in the Seventh and First Circuits who have rejected the existence of a common law speech or debate privilege, we feel, as did the Seventh Circuit dissenters and the Third Circuit majority, that the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming Chief Judge Brown in his protection of the privilege in this case.

We should also comment upon the government's argument *in terrorem* that for the federal courts to recognize the speech or debate privilege for this Tennessee State Senator would open the door to similar claims on behalf of members of lesser legislative bodies like city councils and county boards. This opinion, however, affords no basis for such an extension. Nor will it until and unless a history of "reason and experience" within the meaning of Rule 501 can be cited, which includes recognition of a speech or debate immunity or privilege for city councilmen or county board members in the constitutions of a large majority of the states of the union. This record and our research do not indicate that any state has as yet granted such recognition.

THE EXTENT OF THE PRIVILEGE

Since we affirm the District Judge in holding that Gillock is entitled to a common law speech or debate privilege, we turn to the question also posed in this appeal as to the extent of the privilege. The District Court suppressed Items 3, 8, 9, 11, 12, 13 (found in the Appendix) and the governor's veto letter, *infra*. The government concedes that if the privilege is recognized, Items 9, 11, and 13, which deal directly with Gillock's legislative activity are correctly excluded. It, however, claims that the following items are not part of the legislative process and hence should be admitted at trial:

Item No. 3: (a) On March 6, 1975, the defendant made an official request in writing for an opinion from the Attorney General concerning "Extradition on a Misdemeanor." The request was made to Ray Ashley, Attorney General, with carbon copy to the Assistant Attorney General who had represented the state at the extradition hearing. (A copy is attached as Exhibit A.)

(b) On March 13, 1975, the defendant's request was routed to the Assistant Attorney General for preparation of a reply. (Attached as Exhibit B.)

(c) On March 27, 1975, the Office of the Attorney General rendered an opinion in response to the defendant's request. (Attached as Exhibit C.)

* * *

Item No. 8: On March 25, 1975, Howard recorded a call from the defendant, during which the defendant advised her, in substance, that he had caused the extradition to be held up and could have blocked the extradition because the extradition hearing officer had appeared before the defendant's committee on a matter concerning the budget for the department of government headed by the extradition hearing officer. (A copy of the transcript is attached as Exhibit H.)

* * *

Item No. 12: While the legislation was awaiting approval from the Governor, several individuals, some representing electrical workers and other unions, went to see the

defendant to urge him to withdraw the legislation. They explained to the defendant that the legislation was dangerous, that it would break down licensing ordinances, and that it would result in higher insurance premiums for the general public. The defendant responded that he had already accepted fees ($5,000 from 4 or 5 people) which would have to be refunded if the bill did not pass. After listening to their arguments, the defendant conceded that his bill could have adverse effects, but he implied that he had already spent the fees he had accepted and did not have the funds to make the refund that would be necessary if he withdrew the legislation. The defendant then suggested to at least one of the individuals that if he or the unions could supply the money needed to make the refunds then he could withdraw the legislation. The defendant's suggestion was rejected.

The proof would show that the individuals who had met with the defendant to urge him to withdraw the legislation, and others, then contacted the Governor, explained their opposition to the Governor, and explained the defendant's position to the Governor. On April 3, 1972, the Governor vetoed Senate Bill 1783. (A copy of the veto message is attached as Exhibit M.)

April 3, 1972

Dear Mr. Speaker:

I hereby veto Senate Bill 1783.

This legislation would require any municipal government with a population of 39,000 or more or any county government with a population of 65,000 or more which licenses any trade, craft, service or occupation to license any individual who makes proper application without further examination if that individual has been duly licensed or otherwise authorized to perform the trade, craft, service, or occupation in any city of the state with a population of 39,000 or more or any county in the state with a population of 65,000 or more. This means that any person licensed by the government of Nashville, Memphis, Knoxville, Chattanooga, Jackson, Shelby County, Knox County, or Madison County would be able to practice his occupation in any of these jurisdictions without further examination or without meeting specific requirements established by the jurisdiction from which he is seeking authorization.

The changes anticipated by this legislation would be well founded, in my judgment, only if there were some uniformity in examinations or licensing standards from one jurisdiction to another throughout the state. But there is no doubt that standards vary greatly from one jurisdiction to another and that this reciprocity procedure would tend to un-

dermine the control which local officials exercise over licensing in their jurisdictions.

Proponents of this measure have contended that the exclusive control by local licensing boards over the right to do business within a jurisdiction has tended to create monopolies among contractors or has had a depressing effect on competition. If this is the case and this problem does exist, such situations clearly need rectifying. But I fail to see that this legislation would alleviate those circumstances. I believe that, rather, it would undermine the effective control of elected local representatives and their authorized boards over the regulation of services which vitally affect local citizens.

Before establishing such reciprocity, I believe the General Assembly should consider the feasibility of establishing uniform examinations and licensing standards throughout the state. Once such uniformity is established, it very well may be appropriate to consider reciprocity among local jurisdictions—including all local governments in the state and not just those twelve jurisdictions mentioned in this legislation. It is the consumer whom the statutory law should protect by establishing certain standards of competency.

It is for these reasons that I take this action.

Sincerely,

/s/ Winfield Dunn

We believe that the extent of the privilege granted in this case must be measured by the Supreme Court's views on the extent of immunity granted by the United States Constitution's Speech or Debate Clause, since the values protected by each are basically identical. Having said this does not, however, easily resolve the question of the admissibility of the four items above. While there is broad general language in older cases dealing with the clause, in more recent cases the Supreme Court majority has narrowed the immunity granted to members of Congress.

In 1881, in the first case in which the Supreme Court construed the Speech or Debate Clause, it held that immunity extended to all "things generally done in a session of [Congress] by one of its members in relation to the business before it." *Kilbourne* v. *Thompson*, 103 U.S. 168, 204 (1881). This broad standard could arguably extend immunity to almost any act of a Congressman "relating to" the exercise of his powers of office, providing only that similar acts were "generally done" by other members of Congress.

In 1966, however, the Supreme Court held that the Constitutional immunity did not apply to prosecutions which do not "draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). The Court added:

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was

involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.

United States v. *Johnson, supra* at 172.

Then in 1972, Chief Justice Burger, writing for a majority of six, specifically narrowed the interpretation which might otherwise be placed on earlier cases:

> It is well known, of course, that Members of the Congress engage in many activities other than purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before

it," *Kilbourn* v. *Thompson, supra,* at 204, or things "said or done by him, as a representative, in the exercise of the functions of that office," *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808).

* * *

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.[10] Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

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[10] *See Kilbourn* v. *Thompson,* 103 U.S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson,* 383 U.S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack,* 395 U.S. 486 (1969) (voting for a resolution).

In *Coffin* v. *Coffin,* 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

United States v. *Brewster,* 408 U.S. 501, 512-13, 515-16 & n. 10 (1972).

This view was still further spelled out in *Gravel* v. *United States,* 408 U.S. 606 (1972), where a 5-4

Court held that Senator Gravel's arrangement to publish the Pentagon Papers was not protected by the Speech or Debate Clause:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe*, 455 F. 2d, at 760.

Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

> There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause.
>
> *Gravel* v. *United States*, *supra* at 625-26 (footnote omitted).

See also Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

Our review of these cases convinces us that only one of the four items which we deal with in this section should have been suppressed. That one is Item 3(a), *supra*—Gillock's request for an opinion as to the constitutionality of extradition for a misdemeanor. Even though there was no specific legislation at that time authorizing a legislator to make such a request, *see* TCA § 8-609(6) (1973 ed. & 1977 Cum. Supp.), this request directly related to the legislative process.

As to Items 8, 12 and the Governor's veto message, we believe they are admissible under the standards

of *United States* v. *Brewster, supra,* and later cases. Gillock has no right to claim his speech or debate privilege as to the Governor's exercise of the gubernatorial right of veto. Items 8 and 12 appear to us to be well outside of the ambit of legislative activity.

For the reasons set forth above, the judgment of the District Court is modified by our ruling that Items 8, 12 and the Governor's veto message are admissible and in all other respects is affirmed.

WEICK, Circuit Judge, dissenting. The Speech or Debate privilege for state legislators provided in the Constitution of the State of Tennessee is relevant only where state law is applicable, and affords no protection to state legislators who are being prosecuted in a federal court for committing a federal crime. In a federal prosecution the existence of a privilege of a witness is to be determined by the federal law of evidence. *United States* v. *Craig,* 537 F.2d 957, 958 (7th Cir. *en banc,* 1976), *cert. denied sub nom., Markert* v. *United States,* 425 U.S. 973 (1976).

The Speech or Debate privilege provided in the Constitution of the United States applies only to Congressmen, and not to state legislators. *United States* v. *DiCarlo,* 565 F.2d 802 (1st Cir. 1977), *cert. denied,* 46 U.S.L.W. 3586 (U.S. March 20, 1978).

There is no federal common law speech or debate privilege protecting state legislators who commit federal crimes. *United States* v. *DiCarlo, supra; United States* v. *Craig, supra.* It is submitted that at this late date the federal courts ought not to innovate and

create a new privilege for the protection of state legislators who violate the criminal laws of the United States. The relevant and material evidence of all of their acts in committing federal crimes should be admitted in evidence, including legislative acts and motivations therefore, which ought not to be suppressed. It is not unreasonable to believe that public confidence in the administration of justice in the federal courts will be undermined if state legislators are permitted to violate, with impunity, the criminal statutes of the United States because of a court-created special privilege in their favor, but not in favor of any other person, which privilege results in the suppression of relevant and material evidence of the criminal conduct of the state legislators.

I

Under Rule 26 of the Federal Rules of Criminal Procedure the admissibility of a witness' testimony is governed by Acts of Congress, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. Rule 501 of the Federal Rules of Evidence specifically addresses the issue of privilege, and provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be

> interpreted by the *courts of the United States* in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. [Emphasis added.]

Under Rule 501 the privilege of a witness in a federal criminal prosecution is governed, not by state law, but by the principles of the common law as interpreted by the federal courts in the light of reason and experience.

It is clear that under the last sentence of Rule 501 the state law of privilege is to be applied only in civil actions or proceedings where state law supplies the rule of decision. State law does not supply the rule of decision in a federal criminal prosecution. Certainly the present case is not a civil action or proceeding, but is a federal prosecution of a state senator for accepting bribes in violation of the Hobbs Act. Reliance by the District Judge and by the majority opinion here, on Rule 501 for a federal privilege to suppress evidence of the state senator's acts in accepting bribes, is misplaced. No license to state legislators to accept bribes in violation of federal criminal statutes can be found in the federal common law, or in Rule 501.

The two Federal Appellate Courts that have considered the specific problem presented by this appeal have denied the existence of the asserted privilege.

In the first case to consider the question, *United States* v. *Craig*, 528 F.2d 773 (1976), a majority of a panel of the Seventh Circuit held that a state legislator was entitled to a federal common law speech or debate privilege in a federal criminal prosecution, but that he had waived such privilege. On rehearing *en banc*, *United States* v. *Craig*, 537 F.2d 957 (7th Cir.), *cert. denied sub nom.*, *Markert* v. *United States*, 425 U.S. 973 (1976), a majority of the *en banc* court, adopting the opinion of concurring panel member Judge Tone, held that no such privilege exists, and reversed the order of the District Court suppressing evidence of the defendant's legislative acts and legislative motivations, and remanded with instructions to deny the motion to suppress.

Similarly, the First Circuit in *United States* v. *DiCarlo*, 565 F.2d 802 (1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. March 20, 1978), in affirming the conviction of two state legislators for violations of the Hobbs Act and Travel Act, held that the Speech or Debate Clause in the Federal Constitution does not apply, nor purport to apply, to state legislators, and that the federal common law recognizes no speech or debate privilege applicable in a federal criminal prosecution of a state legislator.

The only other Court to consider the matter is the Third Circuit in *In re Grand Jury Proceedings*, 563 F.2d 577 (1977). There the Court, in dictum, recognized the existence of the privilege, rejected the decision of the *en banc* court in *United States* v. *Craig*, *supra*, and instead, followed the reasoning of the

overruled panel majority. Gibbons, Circuit Judge, concurred in the result. In Judge Gibbons' opinion he stated that federal criminal law is as fully applicable to state legislators as it is to any other resident of the United States. He disagreed with the majority's dictum that there is some sort of federal common law evidentiary privilege which permits state legislators to decline to testify about their legislative acts or motivations for those acts.

We should follow the decisions of the *en banc* court in *United States* v. *Craig*, *supra*, and the First Circuit in *United States* v. *DiCarlo*, *supra*, and the concurring opinion of Judge Gibbons in *In re Grand Jury Proceedings*, *supra*. Accordingly, we should hold that the common law, as interpreted in the light of reason and experience, does not afford a state legislator a speech or debate privilege in a federal criminal prosecution.

II

The purpose of a trial is to determine the truth, which can never be ascertained if we invent new privileges to withhold or to suppress relevant and material evidence.

Federal courts, in consonance with the anicent maxim that the "public has a right to every man's evidence," 8 J. Wigmore, Evidence § 2192 at 70 (McNaughton rev. ed. 1961), should not create a new privilege in the absence of good reason therefor.

> The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of . . . privileges. They should

> be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice. [Footnote omitted.]

Id. § 2192 at 73. *Accord*, *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

The history of the speech or debate privilege indicates that it extends directly to the bitter and protracted struggle for power between the Crown and Parliament, which disrupted England for centuries, *United States* v. *Johnson*, 383 U.S. 169, 178 (1966), *Tenny* v. *Brandhove*, 341 U.S. 367, 372 (1951). This conflict was characterized by the harassment of members of Parliament who criticized the Crown, the Crown contending that there was no privilege with respect to matters relating to its prerogatives, and Commons claiming an absolute privilege of speech or debate in connection with any subject touching parliamentary matters. 4 W. Holdsworth, A History of English Law 89-93 (2d ed. 1937).

It was this conflict, developed over the respective powers of two coordinate branches of the Government, executive and legislative, that was at the core of the development of the privilege. Thus, when viewed as a derivative of the historical processes that created it, it becomes apparent that the speech or debate privilege has relevance only in the context of a single Government.

The Supreme Court, in interpreting the Federal Speech or Debate Clause, has recognized the historic

purpose of the privilege as the preservation of legislative independence and integrity in the context of a governmental system of separation of powers. In *United States* v. *Brewster*, 408 U.S. 501, 508 (1972), the Court stated:

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government. [Footnote omitted.]

To the same effect, *see Gravel* v. *United States*, 408 U.S. 606, 616 (1972), in which the Court stated:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.
>
> [*Id.* at 616]
>
> [T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966) . . . .
>
> [*Id.* at 617]

See also Doe v. *McMillan*, 412 U.S. 306, 311 (1973).

There being no problem of separation of powers between the federal government and a state legislator, *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976), a federal common law speech or debate privilege cannot logically exist.

This conclusion is reinforced by the fact that none of the decisions of the Supreme Court recognizes such a privilege. *Tenny* v. *Brandhove*, 341 U.S. 367 (1951), upon which the defendant relies heavily in support of his contention that the federal common law recognizes a speech or debate privilege applicable to state legislators, was not decided on that basis. Even though the Supreme Court in *Tenny* discussed at some length the speech or debate privilege, its holding was quite narrow, namely, that legislators are immune from civil suits for money damages brought upnder the Civil Rights Act (now codified at 42 U.S.C. §§ 1983, 1985) for their legislative acts. In *Tenny* the Court was not applying a federal common law speech or debate privilege, but rather, was applying the common law doctrine of official immunity. *In re Grand Jury Proceedings*, *supra* at 581; *Craig* v. *United States*, 428 F.2d 773, 782 (1976); *see United States* v. *DiCarlo*, 565 F.2d 802, 806 (1977).

Furthermore, I have been unable to find any decision of a federal appellate court, other than the

dictum in *In re Grand Jury Subpoenas, supra*, that supports such a privilege. An indication that no federal common law speech or debate privilege exists can be discerned from the cases dealing with attempts to obtain injunctions against legislators. Although federal courts have declined to enjoin the acts of Congressmen, holding that such an interference with legislative acts would violate the Speech or Debate Clause of the Federal Constitution, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), *Doe* v. *McMillan*, 412 U.S. 306 (1973), *Powell* v. *McCormack*, 395 U.S. 486 (1969), similar attempts to obtain injunctions against state legislators have been successful. *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963); *Bush* v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.) (three-Judge District Court), *aff'd sub nom.*, *Denny* v. *Bush*, 367 U.S. 908 (1961). Clearly if a federal common law speech or debate privilege exists, injunctive relief against state legislative action which violates federal law could not be granted.

Judges have no immunity for crimes committed by them during the terms of their office or prior thereto. *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938). Nor have the judges any privilege to exclude evidence of crimes committed by them. In *Manton* the judge did not even question evidence showing that his opinions favored bribers. No federal official has ever been

held exempt from prosecution for his commission of a federal crime.

In my opinion it is apparent that no speech or debate privilege has been extended to state legislators as a matter of federal common law. Rather, any protection afforded state legislators is based on the common law doctrine of official immunity. *United States* v. *DiCarlo, supra; United States* v. *Craig, supra.*

Although similar to the speech or debate privilege in its recognition of the need for government officials to be functionally independent, official immunity differs from the speech or debate privilege in significant respects. Some officials enjoy only a qualified immunity. Regardless of whether the immunity is absolute or qualified, its protection against liability for official acts does not extend to criminal prosecutions. *Imbler* v. *Pachman*, 424 U.S. 409, 429 (1976); *O'Shea* v. *Littleton*, 414 U.S. 408, 503 (1974); *Gravel* v. *United States*, 408 U.S. 606, 627 (1972); *United States* v. *DiCarlo*, 564 F.2d 802, 806 (1977); *In re Grand Jury Subpoenas, supra* at 581; *United States* v. *Craig, supra; United States* v. *Anzelmo*, 319 F. Supp. 1106, 1118-19 (E.D. La. 1970).

In *O'Shea* v. *Littleton, supra* at 503, the Supreme Court stated:

> Whatever may be the case with respect to civil liability generally, see *Pierson* v. *Ray*, 386 U.S. 547 (1967), or civil liability for willful corruption, see *Alzua* v. *Johnson*, 231 U.S. 106, 110-111 (1913); *Bradley* v. *Fisher*, 13 Wall. 335, 347, 350, 354 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contem-

plates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia*, 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress . . . ." *Gravel* v. *United States*, 408 U.S. 606, 627 (1972).

Because official immunity affords no protection from criminal liability for acts committed in an official capacity, it follows logically that in a criminal prosecution of a government official, official immunity provides no evidentiary privilege against disclosure of his official acts or the motivation for them comparable to that accorded to Congressmen by their speech or debate privilege. *United States* v. *DiCarlo*, *supra* at 806-07; *United States* v. *Craig*, *supra*.

III

I am of the opinion that neither reason nor authority supports the transformation of the doctrine of official immunity into a federal common law speech or debate privilege. Nothing in our history, nor in any of the authorities cited by the defendant or relied upon by the dictum of the Third Circuit or the panel majority in *United States* v. *Craig*, *supra*, involved abuses of the type which would warrant the creation of such a privilege, namely, interference by the federal government with the independence of state legislators. I believe, however, that the nature of the American judicial and political systems makes re-

mote such a possibility of interference. Before any prosecution against a state legislator can succeed the federal government must convince both a grand jury and a petit jury of the legislator's corruption. This Court should be unwilling to assume that these bodies will act against a state legislator without the requisite proofs. *Cf. United States* v. *Brewster*, 408 U.S. 501, 522 n.16 (1972).

Because the federal government can prosecute state legislators for violations of the federal criminal law, *In re Grand Jury Subpoenas*, *supra*; *United States* v. *Craig*, *supra*; *cf. United States* v. *Brewster*, *supra*, we see no substantial increment in federal power over state legislators resulting from denial of the privilege. Indeed, the exclusion from evidence of legislative acts and legislative motivations may well make a conviction of a state legislator for violation of federal criminal law, impossible.

To permit state legislators to avoid with impunity federal criminal liability for their official acts, "perhaps even more than the increased [federal] power, would gravely undermine legislative integrity and defeat the right of the public to honest representation." *United States* v. *Brewster*, *supra* at 524-25.

Furthermore, an examination of the consequences of a holding that recognizes a federal common law speech or debate privilege for state legislators strongly militates against its adoption. By recognizing such a privilege the Court would eventually become enmeshed in a quagmire of complex policy decisions, such as whether the privilege extends beyond state

legislators to the plethora of other state legislative and quasi-legislative bodies such as city councils and school boards, and whether the privilege applies to civil as well as criminal proceedings. *In re Grand Jury Proceedings, supra* at 586-87 (Gibbons, J., concurring).

These questions are best left for Congress, which "at the federal level . . . has freedom to determine whether a statutory [speech or debate] privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972).

Because there is no federal common law speech or debate privilege, it is not necessary to discuss the second issue presented by this appeal, namely, whether the District Court properly applied the privilege to all items of evidence suppressed.

The suppression order of the District Court should be reversed and the case remanded with directions to deny the motion to suppress.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CR-76-104

UNITED STATES OF AMERICA,

v.

EDGAR H. GILLOCK

OFFER OF PROOF

I. PRELIMINARY STATEMENT

On December 3, 1976, after pre-trial motions and argument, the Court entered an Order suppressing the introduction of any evidence concerning the defendant's "legislative acts and motivation therefor." Upon appeal from that Order, the Court of Appeals vacated the suppression order, finding that the appeal was premature because the suppression order "did not apply to particularized items of evidence," and remanded the case to this Court for further proceedings. The Court of Appeals suggested that the government file a formal bill of particulars or offer of proof setting forth specific categories of evidence or testimony to be tendered at trial.

The government will hereinafter set forth specific categories of evidence to be offered which may arguably be considered "legislative acts" or "motivation therefor."

The government will attempt to set forth in detail all such evidence, based on all the information available to the government at this time. In doing so, it will be necessary to set forth and outline some evidence which clearly would not be covered by the Court's suppression order, so that the relevance and relative importance of the evidence which might be covered can be examined in context.

Since the Court's original order suppressed not only legislative acts, but also any evidence of "motivation therefor," much of the evidence to be set forth will concern conversations between the defendant, or his agent,[1] and others both before and after any actual legislative activity.

In response to the Court's instructions, only an offer of proof will be made at this time, and such offer will be made on the assumption that federal courts recognize a common law speech or debate immunity. A memorandum of points and authorities opposing suppression of the evidence set forth herein

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[1] Some of the evidence to be set forth that relates to Count One will concern third-party conversations that occurred when the defendant was not present. It will be the contention of the government that those statements are admissible and constitute statements of the defendant because the proof will establish that the defendant and his agent were engaged in a common scheme or plan. *See United States* v. *Perna*, 491 F.2d 253 (6th Cir. 1974), *cert. denied*, 417 U.S. 934.

—and preserving for the record the government's position that there is no such immunity for state legislators charged with federal crimes—will be filed separately at a later date.

While there necessarily will be some overlap, particularly with regard to Count Seven, the proffered evidence will be set forth as it relates to particular counts by numbered, itemized categories.

II. COUNT ONE

In count one the indictment charges, in substance, that between January 1, 1975, and March 25, 1975, the defendant, being aided and abetted by John Hundley, attempted to obtain money from Ruth Howard by using his influence as an elected member of the Tennessee General Assembly in furtherance of a plan to block the extradition of James Michael Williams from Tennessee to Illinois.

The proof would show that on November 15, 1974, Williams was arrested in Memphis and was held as a fugitive from Illinois. In December and January, Ruth Howard, Williams' sister, came to Memphis to meet with Williams' attorney, John Hundley. In January, Hundley told Howard he had a "friend who could help her brother, but it would "cost a small sum of money." During her visit to Memphis Hundley introduced Howard to the defendant.

> *Item No. 1*: In March, 1975, Hundley and Howard went to Nashville for Williams' extradition hearing. Howard and Hundley met with the defendant before the hearing and Hundley ad-

vised Howard that the defendant could help her brother, but that the defendant needed "$1,500.00 now and $1,000.00 later." Howard and the defendant then discussed the details of the payments.

Item No. 2: (a) On or about March 6, 1975, the defendant appeared during the extradition hearing for Williams. When Charles Grigsby, the extradition hearing officer, questioned the defendant's presence, he stated that he was not there as an attorney or in his official capacity as a State Senator. However, during the hearing, the defendant questioned David Raybin, the Assistant Attorney General, about the propriety of extraditing on a misdemeanor charge.[2]

(b) During the hearing the defendant requested the Assistant Attorney General's file and reviewed the extradition papers.

(c) The defendant then asked the Assistant Attorney General to step out into the hall for a private conversation. At that time the defendant asked the Assistant Attorney General to postpone the hearing until after the Attorney General could render an official opinion on the question of extradition on a misdemeanor charge. The defendant was advised that he was entitled to an opinion from the Attorney General, but that he would have to make his request in writing through proper channels. (The defendant was entitled to request an opinion from the Attorney General by virtue of his status of State Senator. Only government officials, not attorneys, have the prerogative to request opinions.)

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[2] Williams had been serving a sentence in Illinois for reckless or disorderly conduct when he escaped and was subsequently picked up in Memphis.

(d) The defendant then suggested to the Assistant Attorney General that there was legislation "in the making" to prohibit the Governor from extraditing on a misdemeanor. The Assistant Attorney General rejected that suggestion on the grounds that extradition was a Constitutional question.

Item No. 3: (a) On March 6, 1975, the defendant made an official request in writing for an opinion from the Attorney General concerning "Extradition on a Misdemeanor." The request was made to Ray Ashley, Attorney General, with carbon copy to the Assistant Attorney General who had represented the state at the extradition hearing. (A copy is attached as Exhibit A.)

(b) On March 13, 1975, the defendant's request was routed to the Assistant Attorney General for preparation of a reply. (Attached as Exhibit B.)

(c) On March 27, 1975, the Office of the Attorney General rendered an opinion in response to the defendant's request. (Attached as Exhibit C.)

Item No. 4: (a) After the extradition hearing the defendant told Howard he had "a friend in the governor's office who, when paid off, would see to it that the extradition papers would never reach the governor." The defendant then asked Howard if she was sure she could raise the money, and when she told him she was sure, he instructed her to make the down payment in cash, and then disguise the balance as attorney's fee by executing a promissory note.

(b) On March 7, 1975, Howard and Williams executed a promissory note to the defendant and Hundley for $1,500.00.

Item No. 5: On March 18, 1975, Howard recorded a telephone call to Hundley, during which Hundley told Howard, in substance, that he had been in contact with the defendant, that he had told the defendant she had not yet paid the money, and that the defendant had told him he could still block the extradition if he got the money by the following Monday or Tuesday. (A copy of the transcript is attached as Exhibit D.)

Item No. 6: On March 19, 1975, Howard recorded a telephone call from Hundley, during which Hundley told Howard, in substance, that the defendant had told him it would take him two or three days to get Williams out of jail after the defendant got the money. (A copy of the transcript is attached as Exhibit E.)

Item No. 7: (a) On March 21, 1975, Howard drove from St. Louis, Missouri, to Memphis for the purpose of making the $1,000.00 cash payment to the defendant.

(b) After her arrival in Memphis, Howard recorded a telephone call to Hundley, during which Hundley advised Howard, in substance, that he had been in contact with the defendant and the defendant had told him it was too late to block the extradition. (A copy of the transcript is attached as Exhibit F.)

(c) During the evening of March 21, 1975, Howard recorded several face-to-face conversations with Hundley, during which Hundley advised Howard, in substance, that the defendant

could have blocked the extradition if he had received the money in time. (A copy of the transcript of excerpts [3] of that recording is attached as Exhibit G.)

Item No. 8: On March 25, 1975, Howard recorded a call from the defendant, during which the defendant advised her, in substance, that he had caused the extradition to be held up and could have blocked the extradition because the extradition hearing officer had appeared before the defendant's committee on a matter concerning the budget for the department of government headed by the extradition hearing officer. (A copy of the transcript is attached as Exhibit H.)

Item No. 9: (a) On March 19, 1975, the defendant participated in a hearing conducted by the Senate Judiciary Committee, of which he was a member in the Tennessee Senate.

(b) During that hearing, Charles Grigsby, head of the Tennessee Law Enforcement Academy, appeared before the committee on a matter concerning the budget of the Tennessee Law Enforcement Academy.

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[3] The entire transcript, which is 33 pages, is being furnished to counsel for the defendant. Only selected excerpts have been attached as an exhibit because the government does not believe that the omitted portions could in any way constitute motivation for legislative action. If the government is wrong in this assumption, and the defendant's attorneys contend the omitted portions are covered by the Speech or Debate Immunity, then the transcript will be available for presentation to the Court.

III. COUNTS THREE-SIX

In counts three through six the Indictment charges, in substance, that between February 1, 1972, and April 7, 1972, the defendant attempted to obtain money from four named individuals by using his influence as an elected member of the Tennessee General Assembly in furtherance of a plan to guarantee the named individuals a master electrician's license.

The proof would show that in Tennessee before an electrical contractor can engage in electrical work the contractors must either have or employ someone who has a master electrican's license issued by the particular county or municipality in which the electrical work is to be done. In Shelby County, because of the complexity of the electrical code, the test administered to those seeking a master's license is extremely difficult, and therefore, the master's license is very valuable.

In early 1972, one of the four individuals named in counts three through six contacted the defendant to see if the defendant could be of assistance in obtaining a master's license. Subsequently, in late January or early February some or all of the four individuals met with the defendant and explained to him that they had been unable to obtain a master's license by passing the test. At that time, the defendant advised them that if he could find a way to get them a license he would let them know.

Item No. 10: Approximately two weeks after the initial meeting the defendant called and asked

the four individuals to come to his office. The defendant advised them that he had a way to enable them to obtain a master's license, but that it would cost them $5,000 each. The defendant explained that he could cause legislation to be enacted by the Tennessee General Assembly which would provide for reciprocity in licensing. The legislation would enable an individual who could not pass the difficult test in Shelby County, or Memphis, to obtain a license in another county, or municipality, where the test was not as difficult, and then require the larger county or municipality to recognize the master's license obtained elsewhere. The defendant explained that the $5,000 fee would be on a contingency basis, that is, if the individuals, or at least one of them, did not obtain their master's license within one year, their money would be refunded. Shortly thereafter, two of the four individuals put $5,000 in escrow pursuant to the defendant's proposition. One of the individuals had the defendant execute a written agreement. (A copy of that agreement is attached at Exhibit I.)

Item No. 11: (a) On March 6, 1972, the defendant introduced Senate Bill Number 1783, styled: "AN ACT to provide for reciprocity by municipalities and counties in this state to persons licensed or regulated to engage in a trade, craft, service or occupation." (A copy is attached as Exhibit J.)

(House bill Number 1888 had previously been introduced on March 3, or March 4, 1972. A copy is attached as Exhibit K.)

(b) On March 22, 1972, House Bill Number 1888 was substituted for Senate Bill Number 1783. On March 23, 1972, the defendant proposed an amendment to House Bill 1888 which, in effect, made the minimum population requirements conform to Jackson and Madison County. (A copy is attached as Exhibit L.)

(c) Any and all statements made by the defendant in support of the bill or bills, and the amendment thereto were recorded in the normal course of business of the Tennessee General Assembly and will be introduced as evidence. (Copies are maintained and can be obtained from the Senate and House Legislative Journals and the Library and Archives in Nashville.)

(d) The legislation as amended passed both branches of the legislature and was forwarded to the Governor.

The proof would show that shortly after he put his $5,000 in escrow for the defendant, Sammy Robbins received instructions to go to Jackson, Tennessee, and obtain a master electrican's license from that municipality.

Item No. 12: While the legislation was awaiting approval from the Governor, several individuals, some representing Electrical workers and other unions, went to see the defendant to urge him to withdraw the legislation. They explained to the defendant that the legislation was dangerous, that it would break down licensing ordinances, and that it would result in higher insurance premiums for the general public. The defendant responded that he had already accepted fees ($5,000 from 4 or 5 people) which

would have to be refunded if the bill did not pass. After listening to their arguments, the defendant conceded that his bill could have adverse effects, but he implied that he had already spent the fees he had accepted and did not have the funds to make the refund that would be necessary if he withdrew the legislation. The defendant then suggested to at least one of the individuals that if he or the unions could supply the money needed to make the refunds then he could withdraw the legislation. The defendant's suggestion was rejected.

The proof would show that the individuals who had met with the defendant to urge him to withdraw the legislation, and others, then contacted the Governor, explained their opposition to the Governor, and explained the defendant's posiiton to the Governor. On April 3, 1972, the Governor vetoed Senate Bill 1783. (A copy of the veto message is attached as Exhibit M.)

Item No. 13: (a) on April 13, 1972, the defendant moved to override the Governor's veto. The motion failed, seven "ayes", sixteen "no's" and two not voting.

(b) Any and all statements made by the defendant in support of his motion to override the veto of Senate Bill 1783 were recorded in the normal course of business of the Tennessee General Assembly and will be introduced as evidence.

Item No. 14: Subsequently,the two individuals who had put $5,000 in escrow received refunds from the defendant. All but $250 was refunded. The $250 was retained by the defendant as attorney's fees.

IV. COUNT SEVEN

In count seven the Indictment charges, in substance, that between January 1, 1972, and April 7, 1972, and between January 1, 1975, and March 25, 1975, the defendant was employed and associated with an enterprise (being an elected member of the Tennessee General Assembly) and did engage in the affairs of said enterprise through a pattern of racketeering activity by performing the acts set forth in Counts One through Six and by agreeing to accept things of value in exchange for his promise to exercise his influence, judgment and prerogatives under color of office.

The proof offered in support of Count Seven would include all of the evidence set forth in items 1-14 herein, and would include evidence setting forth the dates and times the defendant acted in an official capacity while performing his duties and serving as an elected representative. Additionally, the proof would include an explanation of the general function of the Tennessee General Assembly, the legislative process in the State of Tennessee, and the rights, duties and obligations of an elected representative.

Respectfully submitted,

W. J. MICHAEL CODY
United States Attorney

By /s/ GLEN REID, JR.
Glen Reid, Jr.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Glen Reid, Jr., Assistant United States Attorney for the Western District of Tennessee, certify that a copy of the foregoing Offer of Proof has been forwarded to defendant's attorneys of record: Hal Gerber, 100 North Main Building, Memphis, Tennessee 38103; and James Neal, Third National Bank Building, Nashville, Tennessee 37219, via United States Mail, postage prepaid, this 1st day of September, 1977.

/s/ GLEN REID, JR.
Glen Reid, Jr.
Assistant United States Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Nov. 1, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: WEICK, EDWARDS and ENGEL, Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennesseee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: January 26, 1979

COSTS: None

Filing fee ..... $ ———

Printing ..... $ ———

Total $ ———

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Jan. 17, 1979]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: EDWARDS, Chief Judge, WEICK and ENGEL, Circuit Judges

ORDER

On receipt and consideration of a petition for rehearing and a suggestion for rehearing en banc in the above-styled case; and

The majority of the judges in active service in this court not having voted in favor of the motion for rehearing en banc, and the motion for rehearing having been referred under the Rules of the United States Court of Appeals for the Sixth Circuit to the panel which heard the case; and

It appearing to the panel that no issue is presented by the motion for rehearing which had not been adequately considered before issuance of the opinion,

Said motion is hereby denied, Judge Weick dissenting.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Jul. 12, 1977]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: EDWARDS, PECK and ENGEL,
Circuit Judges

ORDER

This is an interlocutory appeal from a pretrial order suppressing all evidence of the defendant's "legislative acts and motivation therefor." The indictment charges the defendant, a Tennessee state senator, with unlawfully interfering in an extradition proceeding, unlawfully attempting to use the prerogatives of his elected public office to guarantee the obtaining of master electrician's licenses, and participating in the conduct of the state legislative body through a pattern of racketeering activity.

Upon motion of the defendant, the court ruled that state legislators were entitled to assert an evidentiary speech or debate privilege pursuant to Rule 501, Fed-

eral Rules of Evidence, and entered the suppression order. The government has sought to perfect an appeal under 18 U.S.C. § 3731, filing herein the required certification by the United States Attorney.

Upon consideration of the record, however, the court is of the opinion that the appeal is premature and that the order should be vacated. The district court's decision does not apply to particularized items of evidence, but encompasses only a broad category. While the government had submitted a document entitled "a statement of theory", which described the general outline of the case against the defendant, no formal bill of particulars was filed, and no offer of proof was otherwise made. Because the order lacks specificity, a review at this stage of the proceedings would effectively require the court to render an advisory opinion. *Compare United States* v. *Fruehauf*, 365 U.S. 146 (1961) (premature appeal); *Nixon* v. *Sirica*, 487 F. 2d 700, 721 n. 100 (D.C. Cir. 1973) *with United States* v. *Abraham*, 541 F. 2d 624 (6th Cir. 1976) (jurisdiction upheld); *United States* v. *Battisti*, 486 F. 2d 961 (6th Cir. 1973) (jurisdiction upheld).

IT IS ORDERED that the suppression order be vacated and the case remanded to the district court for further proceedings consistent herewith, without prejudice to any right of the government to seek a more specific determination by the district court with respect to the admissibility of particular testimony

or other evidence which may be tendered for use at the trial.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Criminal CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION AND ORDER GRANTING MOTION TO SUPPRESS EVIDENCE

Following this court's memorandum decision and order of December 3, 1976, granting defendant's motion to suppress with respect to all of his "legislative acts or motivation therefor," the Government took an interlocutory appeal pursuant to 18 USC § 3731. The Government contended, on appeal, that defendant, as a state senator, has no speech or debate evidentiary privilege with respect to this federal prosecution. However, by order entered on July 12, 1977, the Court of Appeals held that the appeal was premature and that this court's order of suppression should be vacated. The basis for the decision of the Court of Appeals was that this court's suppression order "does not apply to particularized items of evi-

dence, but encompasses only a broad category" and that therefore a review of this court's ruling "would effectively require the [Court of Appeals] to render an advisory opinion." The Court of Appeals in effect invited the Government to obtain a ruling from this court as to the specific items of evidence that would be covered by the speech or debate privilege by filing a bill of particulars or offer of proof.

The Government on September 1, 1977, filed an "Offer of Proof," supplemented on September 19, delineating the proof it would offer at trial, together with a memorandum stating its position. In the memorandum, the Government, without conceding its basic position that defendant has no evidentiary privilege at all, concedes that certain of its items of evidence would be covered by the privilege. Defendant has filed a response in which it is contended that still other items of evidence would be covered by the privilege.

Before ruling on the question as to which of these items of evidence are covered by the privilege and therefore should be suppressed, we point out that, subsequent to our memorandum decision of December 3, 1976, holding that defendant does have a speech or debate privilege, the Court of Appeals for the Third Circuit likewise so held. *In Re: Grand Jury Proceedings*, —— F.2d —— (3rd Cir. Nos. 77-1970/1 and 77-2051/2/3, September 7, 1977.)

We conclude that, while the defendant's evidentiary privilege is in no wise grounded in the federal constitutional provision creating the privilege enjoyed by Members of Congress, the limits of the Congressional privilege should be applied here. This seems to be the conclusion of the Third Circuit in the decision just cited. More specifically, we believe the decision of the Supreme Court in *United States* v. *Brewster*, 408 U.S. 501 (1972), dealing with the privilege of federal legislators, is the yardstick to be applied here since such is a recent decision and deals with an analogous situation.

In *Brewster*, a United States Senator had been indicted for allegedly taking bribes in return for his being influenced as to his actions and votes and decisions on postage rate legislation. While the Court agreed that the Senator's votes, speeches and actions on the floor or other legislative acts could not be proven, other evidence might be introduced that could sustain a conviction. The Court said (at 526-527):

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. * * * * Nor is inquiry into a legislative act or the motiva-

tion for a legislative act necessary to a prosecution under this statute or this indictment. * * * *

Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

It is agreed by the parties that items 9(a), 9(b), 11(a) first sentence, 11(b), 11(c), 11(d), 13(a) and 13(b) would be subject to the privilege. We do not believe that 11(a) second sentence would be subject to the privilege since it only has to do with the introduction of a bill in the lower house and not by defendant. On the other hand, the supplement to the offer of proof would be subject to the privilege since it has to do with defendant's causing members of the lower house to introduce such bill in the lower house.

With respect to items 3(a), 3(b) and 3(c), we agree with defendant that such would be covered by the privilege. These have to do with defendant's seeking and obtaining an opinion by the state Attorney General as to whether a person may be extra-

dicted for a misdemeanor committed in another state. We reach the conclusion because, as pointed out by defendant and as demonstrated in the Government's brief in the Court of Appeals, it is the Government's very theory that in seeking and obtaining such opinion, defendant afforded himself of a right which he possessed as a state senator.

We agree with defendant that item 12 is subject to the privilege since the evidence would make no sense unless the witnesses were allowed to refer to legislation that defendant had introduced.

We agree with defendant that item 8 is subject to the privilege since as pointed out by defendant, the Government conceded in its brief in the Court of Appeals that such evidence could only be made relevant by showing that defendant was a member of a senate committee and attended a particular committee meeting at which Grigsby appeared.

We agree that the Governor's veto would be subject to the privilege since such would be relevant only on the inference that defendant had voted for the passage of the bill.

We believe it would be permissible for the Government to show generally the function of the Tennessee legislature and of the two houses thereof and that defendant is a state senator, for otherwise the jury would not know that defendant is a senator and might not know what a state senator is and his function in state government.

In summary, this court concludes that the following, but only the following, items of evidence as de-

lineated in the Government's "Offer of Proof" will be suppressed: 9(a), 9(b), 11(a) first sentence and supplement, 11(b), 11(c), 11(d), 13(a), 13(b), 3 (a), 3(b), 3(c), 12, 8 and the Governor's veto message.

It is so ORDERED.

ENTER this 28th day of September, 1977.

/s/ Bailey Brown
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Criminal CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION AND ORDER

This cause has been before this court on two prior occasions on various motions, and the court entered memorandum decisions on October 5 and November 9, 1976. Since then, defendant has filed additional motions that have been argued.

One of these motions (a renewed motion) is to dismiss Count VII on the ground that the State legislature is not an "enterprise" within the meaning of 18 U.S.C.A. § 1961 upon which the Count is based. The main argument here is, in general, that the statute contains a definition for "State," which includes subdivisions and instrumentalities of States (which would include the legislature) and also includes a separate provision that defines "enterprises." The defendant's further argument is that an interest in an enterprise acquired in violation of the statute

may be declared forfeited but that a State senator's position in the legislature could not be forfeited to the United States.

In response, the government points out that the statutory definition of an "enterprise" includes an "individual" and that an individual could not, as an office in the legislature could not, be forfeited to the United States. The government's main argument is based on the broad definition of "enterprise" contained in the statute, which includes ". . . any . . . association, or other legal entity, and any . . . group of individuals associated in fact although not a legal entity." Moreover, as the government points out, in *United States* v. *Frumento*, 405 F.2d 23 (E.D. Pa. 1975), the Court held that an "enterprise" under § 1961 included the Bureau of Cigarette and Beverage Taxes of Pennsylvania. Further, as the government also points out, in *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976), it is stated that (at 479) the word "enterprise" should be given a "very broad meaning."

Defendant advances other and less well-founded grounds for dismissing Count VII which need not be dealt with in this memorandum.

Accordingly, we conclude that the motion to dismiss Count VII must again be overruled. It is so ORDERED.

Defendant also moves to suppress ". . . as evidence . . . all legislative proceedings, including the drafting, introduction, amendment, passage, veto, and attempts to override such veto of Senate Bill No.

1783 (House Bill No. 1888)" on the ground that the introduction of such evidence would violate the defendant's speech or debate privilege.

This court dealt with defendant's claimed speech or debate privilege in the memorandum of November 9. On that occasion the privilege was relied upon by defendant in support of a motion to dismiss the indictment. In the memorandum, we pointed out that the only case that deals with the privilege (with respect to state legislators where a federal criminal prosecution is involved) is *United States* v. *Craig*, 528 F.2d 773, 537 F.2d 957 (*en banc*), (7th Cir. 1976). In that case, the court, *en banc*, by a five to three vote, held that a state legislator has no speech or debate privilege vis-a-vis a federal criminal prosecution. We further pointed out in the memorandum that even if defendant had a speech or debate privilege upon which he could rely here, he still could be prosecuted for (and evidence could be introduced to support) an agreement to receive or the receipt of a bribe to influence defendant's performance of his function as a legislator and that therefore the speech or debate privilege could not be the basis for dismissal of the indictment. This conclusion had two bases. The first was that even under the minority (*en banc*) view in *Craig*, defendant has no immunity from prosecution and that he has only an evidentiary privilege. The second basis was that, by analogy to the speech or debate privilege applicable to members of Congress, the defendant's privilege, if he had one, would only prohibit the showing of ". . . legislative

acts or the motivation for legislative acts." *United States* v. *Brewster*, 408 U.S. 507 (1972) at 512.

At this point we should make clear that, with respect to the instant motion, defendant's counsel, at argument, conceded that defendant's privilege could be no broader than that of a member of Congress as indicated in *Brewster, supra.*

Thus the question presented is whether there is an evidentiary privilege with respect to defendant's "legislative acts or motivation for legislative acts."

As we pointed out in the memorandum of November 9, all of the judges in *Craig* agreed that there is no immunity from prosecution as a result of the speech or debate clause in the federal or state Constitutions and that there is no federal common law immunity from prosecution. The division between the majority and minority was as to the question whether there is a privilege under Rule 501 of the Rules of Evidence in the United States Courts. Rule 501 provides in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

As we read Judge Tone's concurring opinion in *Craig* (which became the majority view of an *en*

banc court), this reason for holding that there is no speech or debate privilege for state legislators in this context is this: that the reason for the speech or debate privilege in the federal Constitution is to maintain the principle of the separation of powers of Congress vis-a-vis the federal executive branch; there being no problem of separation of powers as between the federal executive and the state legislatures, the federal Constitution creates no speech or debate privilege for state legislators and the federal courts should not recognize one pursuant to Rule 501 of the Rules of Evidence.

As we read Judge Cummings' opinion in *Craig* (which became the minority view of the *en banc* court), his reason for holding that there is a privilege under Rule 501 is this: that while separation of powers is one of the reasons for speech or debate protection for members of Congress in the federal Constitution and for members of legislatures in state constitutions, it is not the *only* reason; moreover the very nature of our federal system, with our federal government being one of limited powers, as well as a continuing need to maintain federal-state relations in appropriate equilibrium require that state legislators have the protection of the speech or debate privilege vis-a-vis the federal executive branch and it prosecutors.

Upon consideration, we conclude that Judge Cummings has the better of the debate, particularly in the light of some language in a couple of Supreme

Court opinions dealing with the reason for the speech or debate privilege.

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), the precise question presented was whether state legislators, in performing legislative functions, could be civilly liable (under an Act of 1871, now 42 USCA § 1983) for damages for violating a person's civil rights. The Court concluded that, in enacting § 1983, Congress did not intend to create such liability. While, of course, the question in *Tenney* is not the same as the question here, some of the language in *Tenney* as to the reason for the speech or debate privilege is applicable. The Court said, *inter alia*:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.
>
> at 372.
>
> * * * *
>
> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that

> liberty may occasion offence." II Works of James Wilson (Andrews ed 1896) 38.
>
> at 373.
>
> * * * *
>
> As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.
>
> at 375.

Also, it is appropriate to point out that the Court indicated doubt as to whether Congress could, under the federal Constitution, limit the speech or debate freedom of state legislators. It said at 376:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle.

In *United States* v. *Brewster*, 408 U.S. 501 (1972), in the majority opinion by Chief Justice Burger,

while it held that the speech or debate privilege does not afford protection except as to legislative acts or motivation for legislative acts of members of Congress, it states at 507-508:

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in United States v. Johnson, 383 US 169, 15 L Ed 2d 681, 86 S Ct 749 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout the United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." Id., at 178, 15 L Ed 2d at 687 (footnote omitted).

We conclude that, under Rule 501 of the Rules of Evidence, defendant has a speech or debate privilege with respect to, but only with respect to, his legislative acts and motivation therefor because we believe that such is required, as stated in the Rule, "by the principles of the common law" as they are

interpreted "in the light of reason and experience." The reasons for the conclusion are these. The privilege is necessary, to paraphrase Chief Justice Burger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. To the extent that venal legislators might go unconvicted because of the government's being barred from proving legislative acts and motives, this is the price that the Founding Fathers believed we have to pay for legislative independence. Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

Accordingly, the motion of defendant to suppress evidence, to the extent indicated herein, will be granted. It is so ORDERED.

At argument, counsel for the defendant questioned government counsel whether, in the event this court granted defendant's motion to suppress, the government would appeal or go ahead with the trial on December 6. Presumably defendant's counsel had in mind 18 USCA § 3731 which provides in part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the

defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Government counsel replied that the government would proceed to trial.

ENTER this 3rd day of December, 1976.

/s/ Bailey Brown
Chief Judge

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Supreme Court, U. S.
FILED
JUL 19 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 19, 1979
CERTIORARI GRANTED MAY 14, 1979

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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* A copy of the opinion of the United States Court of Appeals for the Sixth Circuit was reproduced as Appendix A to the petition for a writ of certiorari (pp. 1a-51a). An earlier opinion of the court of appeals, remanding for a more definite finding, was reproduced as Appendix D to the petition (pp. 56a-58a). The September 28, 1977, and December 3, 1976, orders of the United States District Court for the Western District of Tennessee, granting respondent's motion to suppress, were reproduced as Appendices E and F to the petition (pp. 59a-64a and 65a-74a, respectively).

DOCKET ENTRIES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cr. No. 76-104

UNITED STATES

v.

EDGAR H. GILLOCK

Date		Proceedings
8-12-76	1	Indictment
8-18-76	3	Order on Arraingment [sic]; plea of NOT GUILTY.
8-30-76	5	Motion to Dismiss for failure to State an Offense.
8-30-76	6	Memorandum in Support of Motion to Dismiss for failure to State an offense.
8-30-76	13 13a	Motion and Memorandum in Support of Motion to Dismiss and/or suppress pursuant to defendants privilege under the speeck [sic] and debate clause of the Tennessee constitution.
10-5-76	25	Memorandum Decision and order on Motion to Dismiss Indictment—Motion to DISMISS Count II is *granted* and the motion to dismiss the other counts is *denied*; defendant is allowed to withdraw his motion for a bill of particulars and to file a new motion within ten days.
11-9-76	31	Memorandum Decision.
11-22-76	34	Motion to Suppress.
11-22-76	35	Memorandum in Support of Motion to Suppress.

Date	Proceedings

11-30-76 38 Motion to Dismiss Count Seven

11-30-76 39 Memorandum in Support of Motion to Dismiss Count Seven.

11-30-76 HEARING ON MOTION TO SUPPRESS.

12-3-76 40 Memorandum Decision and Order—Motion to Dismiss Count Seven OVERRULED; Motion to Suppress GRANTED at [sic] to Legislative Act and Motivation.

12-7-76 41 Certification of United States Attorney.

12-22-76 43 Notice of Appeal.

1-5-77 MAILED CERTIFIED RECORD TO COURT OF APPEALS—NO TRANSCRIPT.

8-16-77 44 Order that Government should submit a written offer of proof

9-1-77 45 Offer of Proof.

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10-27-77 53 certification of the United States Attorney.

10-27-77 54 Notice of Appeal

10-28-77 MAILED CERTIFIED RECORD TO COURT OF APPEALS (without transcript)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

8-12-76

CR. NO. 76-104
18 USC, § 1951
18 USC, § 1952
18 USC, § 1962
18 USC, § 2

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

INDICTMENT

[Filed Aug. 12, 1976]

THE GRAND JURY CHARGES:

COUNT ONE

From on or about the 1st day of January 1975 up to and including the 25th day of March 1975, in the Western District of Tennessee and in the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully attempted, being procured, induced, counseled, aided and abetted by John Hundley, an attorney not named herein as a defendant, under color of official right, as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District in Shelby County, Tennessee, to obtain money from Ruth Howard in furtherance of a plan and purpose to obstruct, delay and affect commerce by preventing the transportation of James Michael Williams from the State of Tennessee to the State of Illinois, in violation of Title

18, United States Code, § 1951 and Title 18, United States Code, § 2.

(nm $10,000., or nm 20 yrs., or both)

COUNT TWO

From on or about the 1st day of January 1975 up to and including the 25th day of March 1975, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully used, being procured, induced, counseled, aided, and abetted by John Hundley, an attorney not named herein as a defendant, a facility in interstate commerce, to wit, the telephone and the mails and did cause Ruth Howard to travel in interstate commerce between the State of Missouri, and the State of Tennessee in an attempt to distribute the proceeds of a bribe which EDGAR H. GILLOCK agreed to accept in violation of Tennessee Code Annotated, § 39-802 for agreeing to exercise influence under color of his office as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District of Shelby County, Tennessee, in order to intercede taking advantage of deference accorded him and prerogatives available to him by virtue of his elected public office in such a way to prevent the extradition of James Michael Williams from the State of Tennessee to the State of Illinois, in violation of Title 18, United States Code, § 1952 and Title 18, United States Code, § 2.

(nm $10,000., or nm 5 yrs., or both)

COUNT THREE

From on or about the 1st day of February 1972 up to and including the 7th day of April 1972, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully attempted under color of official right as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District in Shelby County, Tennessee to obtain approximately Five Thou-

sand ($5,000.00) Dollars from Donald W. Bumpas in furtherance of a plan and purpose affecting commerce, to wit, to use the prerogatives of his elected public office in an offer to guarantee a means by which said Donald W. Bumpas could obtain a license as a master electrician usable by him in Shelby County, Tennessee, in violation of Title 18, United States Code, § 1951.

(nm $10,000., or nm 20 yrs., or both)

COUNT FOUR

From on or about the 1st day of February 1972 up to and including the 7th day of April 1972, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully attempted under color of official right as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District in Shelby County, Tennessee to obtain approximately Five Thousand ($5,000.00) Dollars from Sammy Robbins in furtherance of a plan and purpose affecting commerce, to wit, to use the prerogatives of his elected public office in an offer to guarantee a means by which said Sammy Robbins could obtain a license as a master electrician usable by him in Shelby County, Tennessee, in violation of Title 18, United States Code, § 1951.

(nm $10,000., or nm 20 yrs., or both)

COUNT FIVE

From on or about the 1st day of February 1972 up to and including the 7th day of April 1972, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully attempted under color of official right as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District in Shelby County, Tennessee to obtain approximately Five Thousand ($5,000.00) Dollars from Bobby Davis in further-

ance of a plan and purpose affecting commerce, to wit, to use the prerogatives of his elected public office in an offer to guarantee a means by which said Bobby Davis could obtain a license as a master electrician usable by him in Shelby County, Tennessee, in violation of Title 18, United States Code, § 1951.

(nm $10,000., or nm 20 yrs., or both)

COUNT SIX

From on or about the 1st day of February 1972 up to and including the 7th day of April 1972, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK unlawfully attempted under color of official right as an elected member of the Tennessee General Assembly holding the position of Senator representing the 28th Senate District in Shelby County, Tennessee to obtain approximately Five Thousand ($5,000.00) Dollars from Gary Davis in furtherance of a plan and purpose affecting commerce, to wit, to use the prerogatives of his elected public office in an offer to guarantee a means by which said Gary Davis could obtain a license as a master electrician usable by him in Shelby County, Tennessee, in violation of Title 18, United States Code, § 1951.

(nm $10,000., or nm 20 yrs., or both)

COUNT SEVEN

From on or about the 1st day of February 1972 up to and including the 7th day of April 1972 and from on or about the 1st day of January 1975 up to and including the 25th day of March 1975, in the Western District of Tennessee and the Middle District of Tennessee, EDGAR H. GILLOCK, being employed and associated with an enterprise, to wit, being an elected member of the Tennessee General Assembly as a Senator representing the 28th Senate District in Shelby County, Tennessee, the activities of which affect interstate and foreign commerce, unlawfully did participate, directly and indirectly, in the conduct of the affairs of said Tennessee General Assembly through a pattern of racketeering activity, as more fully described in any two or more of Counts One through Six of this Indictment, said acts each being violations of Tennessee Code Annotated, § 39-802 prohibiting said EDGAR H. GILLOCK from agreeing to accept anything of value in return for a promise or agreement to exercise his influence, judgment and prerogatives accorded him under color of office, in violation of Title 18, United States Code, § 1962.

(nm $25,000., or nm 20 yrs., or both)

A TRUE BILL:

_____

Foreman

DATED: August 12, 1976

_____

United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CRIMINAL CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION AND ORDER ON
MOTION TO DISMISS INDICTMENT

[Filed Oct. 5, 1976]

This cause is before the court on motion to dismiss the indictment, memorandum briefs and extensive argument.

Since, as will be seen, the court concludes that Count II must be dismissed, we will deal with that count first. As also will be seen, the court has serious doubt as to whether the other counts state a federal crime, but we will not dismiss them at this time.

COUNT II

As to Count II, defendant contends, firstly, that it does not allege a crime under 18 USCA § 1952 (Travel Act) and § 2 (aiding and abetting statute), upon which it is based, because the conduct alleged does not, as it must, constitute a violation of TCA § 39-802, a Tennessee bribery statute. It does not constitute a violation of § 39-802, defendant contends, because under the law of Tennessee a matter of extradition could not come before the defendant ". . . in his official capacity . . ." and that such is necessary for a violation of TCA § 39-802. The Government concedes, as the Travel Act plainly provides, that it is necessary that the conduct alleged amount to a crime under TCA § 39-802. The Government further

concedes that a matter of extradition could not officially come before defendant as a state senator; the Government contends, however, that such is not necessary to a violation of TCA § 39-802. Thus the argument here turns on an interpretation of § 39-802.

We agree with the defendant that § 39-802 covers only matters coming before a legislator in his official capacity. Otherwise, it would cover any situation in which a legislator received a thing of value under an understanding that his ". . . opinion or judgment is to be given in [a] particular manner . . ." on any subject whatsoever and under any circumstances. The Government argues that this is, indeed, the proper interpretation to place on this statute. We cannot place this interpretation on the statute, however, because such an interpretation would lead to some ridiculous results that are easy to imagine and because of the universally accepted principle that criminal statutes are to be narrowly construed in favor of leniency.

Defendant, with respect to Count II, makes the additional contention that it does not allege, as the Travel Act requires, (1) that *when* the defendant used the telephone and mails as facilities in interstate commerce, he did so with intent to distribute the proceeds of an unlawful activity and (2) that *thereafter* defendant attempted to distribute the proceeds of an unlawful activity. The Government concedes that the Travel Act requires proof of both of such facts (*United States* v. *Prince*, 529 F.2d 1108 (6th Cir. 1976)) and simply argues that both are sufficiently alleged in the indictment. We agree with the defendant that such facts are not sufficiently alleged and therefore Count II must be dismissed for these additional reasons.*

---

* The Government at argument indicated that it does not rely on, as a separate basis of federal jurisdiction, the causing of Ruth Howard to travel in interstate commerce. Rather, the Government's position is that this allegation was made in connection with the "thereafter" requirement and should be construed to mean that the travel by Howard occurred *after* the use of the mail and telephone as facilities in interstate commerce. As indicated above, we do not believe the indictment is fairly subject to such construction.

COUNT I AND COUNTS III THROUGH VI

These counts are based on the Hobbs Act, 18 USCA § 1951. Under the Hobbs Act, there are two ways of charging an interstate commerce nexus. The first way of charging the nexus is that, by robbery or extortion (or an attempt at such), the defendant affected commerce or attempted or conspired to affect commerce. In *United States* v. *Staszuck*, 517 F.2d 53 (7th Cir. 1975), it was held that, under such an indictment allegation, the proof was sufficient if it was shown that an extortion had a realistic probability of affecting interstate commerce, although it had no actual effect on such commerce. Alternatively, under the Hobbs Act, it may be charged that the defendant committed or threatened physical violence in furtherance of a plan or purpose to do anything in violation of the Act. In *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), it was held that, under such a charge, it must be shown that the defendant attempted or committed physical violence in furtherance of a plan or purpose to affect commerce by robbery or extortion.

In Count I and Counts III through VI, the indictment does not follow either of these alternatives. It charges attempted extortion as such is defined under § 1951;* physical violence is not charged. So it really charges attempted extortion in furtherance of a plan or purpose to affect commerce (by attempted extortion).

At argument, counsel for defendant seemed to concede that, under the authorities, such an indictment allegation will pass muster, and this court believes that it probably will. We say this because we believe that an allegation (as is alleged) that the defendant attempted extortion in furtherance of a plan or purpose to affect commerce is equivalent to an allegation that the defendant attempted extortion in an attempt to affect commerce, thus bringing the allegation under the first alternative discussed above.

---

* "Extortion" is there defined to include the obtaining of property from another, with his consent, under color of official right, and therefore includes the receipt (or the attempted receipt) of a bribe by a public official.

The principal problem with these Hobbs Act counts is created by a very recent decision by our Court of Appeals. *United States* v. *Yokely*, —— F.2d —— (6th Cir., No. 76-1135, decided September 13, 1976). In that case the defendant was indicted under the Hobbs Act by a federal grand jury for armed robbery of a K-Mart Store in the Detroit area. The district judge dismissed on the ground that the Hobbs Act covered only illegal labor activities. While the Court of Appeals disagreed to the extent that it held that the Hobbs Act covered other than labor activities, it affirmed on the ground that the Hobbs Act is confined to "racketeering activities," whether labor or non-labor. Thus the Court of Appeals determined that an armed robbery that quite clearly affected interstate commerce (because of the source of supply of the K-Mart), and therefore was covered by the literal wording of the Hobbs Act, was not covered by the Act because, in the light of its legislative history, the Act was aimed at "racketeering activities." The armed robbery involved, the court held, was not such activity.

The problem in applying this *Yokely* decision to the instant case is, as was quite frankly pointed out by defense counsel at argument, the opinion does not define "racketeering activity." Certainly the activity of the defendant charged in the instant indictment (as a state senator, the attempt in 1975 to collect a bribe to prevent an extradition and the attempt in 1972 to collect bribes to aid certain persons to obtain an electrician's license) would not ordinarily be thought of as "racketeering." However, there are many cases in the books, of which the *Staszcuk* case, *supra*, is one, which have applied the Hobbs Act in situations similar to that alleged in this indictment.

We understand the Government is seeking an *en banc* hearing in the *Yokely* case, and, it would seem, will seek review by the Supreme Court if the *Yokely* decision stands. This being so, the court points out that it might be good judicial administration, if the parties could so agree, to defer trial of this case to await further developments in the *Yokely* case.

COUNT VII

Count VII is based on 18 USCA § 1962. While the Government's memorandum quotes and relies on § 1962 (b), it is obvious from the context of Count VII that the Government actually relies on § 1962(c), for, clearly, Count VII does not charge a crime under § 1962(b). This is so because there is no allegation that the defendant, through a pattern of racketeering activity, acquired or maintained an interest in or control of the state legislature, as is required by § 1962(b). The allegation in Count VII is that the defendant, through such activity, participated in the conduct of the affairs of the legislature, which satisfies the requirement, in this respect, of § 1962(c).

As has been seen, § 1962(c) requires, as is alleged, that the defendant have participated in the conduct of the affairs of the legislature through a "pattern of racketeering activity." Sec. 1961(1) defines "racketeering activity" to include the offense of bribery under state law and to include violations of § 1951 (Hobbs Act) or § 1952 (Travel Act); and § 1961(5) defines "pattern of racketeering activity" to mean at least two acts of racketeering activity. To meet this requirement of § 1962 (c), the Government relies on the allegations of violations of the Hobbs Act and Travel Act in Counts I through VI as constituting at least two acts of racketeering activity and alternatively relies on the allegation of bribery in such counts as being violations of TCA § 39-802 as constituting at least two acts of racketeering activity.

We have already held that Count II does not charge a violation of the Travel Act, and we have indicated that we have serious doubt whether Count I and Counts III through VI allege a violation of the Hobbs Act. With respect to the alleged violations of TCA § 39-802, we have already held that no such violation is alleged in Count II. The same ruling would apply to Count I since it also charges the same attempt to collect money to

prevent an extradition.* With respect to Counts III through VI, it cannot be ascertained whether the matter that was the subject of the alleged bribe (i.e. to obtain an electrician's license) would come before the defendant in his official capacity as a state senator and therefore be a violation of TCA § 39-802. It would appear that this should be covered by a bill of particulars hereinafter discussed.

Since we are not dismissing the Hobbs Act counts, Count I and Counts III through VI, we are of the opinion that Count VII should not be dismissed. If, however, these counts are ultimately dismissed and if it should appear (after the filing of a bill of particulars) that Counts III through VI do not state a bribery offense under TCA § 39-802, then it would follow that Count VII should likewise be dismissed.

At argument, counsel for defendant agreed that he had filed a "boiler plate" motion for a bill of particulars and indicated a desire to withdraw it and file a new motion. Such motion will be granted.

It is therefore ORDERED that the motion to dismiss Count II be and it is hereby granted and the motion to dismiss the other counts be and it is hereby denied.

It is further ORDERED that defendant be allowed to withdraw his motion for a bill of particulars and to file a new motion within ten days.

ENTER this 5 day of October, 1976.

/s/ Bailey Brown
Chief Judge

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* Although it is not specifically charged in Count I that the bribe was sought to prevent extradition, at argument the Government conceded that here, as in Count II, this is its contention. This question should be covered by a bill of particulars.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CRIMINAL CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION

[Filed Nov. 9, 1976]

Following our memorandum decision of October 5, 1976, dismissing Count II, this case has been before the court for further argument on the motions to dismiss the indictment. The government has, prior to this second argument, filed a response to the motion for a bill of particulars setting out its theories.

In the aforesaid memorandum decision, this court expressed doubt as to whether the Hobbs Act could properly be the basis of Count I and Counts III through VI in this indictment because of the language in the *Yokely* case, —— F.2d —— (6th Cir., decided September 13, 1976), to the effect that the Act applies only to "racketeering" situations. There, although the court was dealing with the applicability of the Act to an armed robbery of a K-Mart store, it used, as indicated, rather broad language in holding that the Act did not apply to such an armed robbery. Upon reflection, we have concluded that the court could not have meant to hold that the Act could only be applied to "racketeering" activity as such is usually thought of. Otherwise, the Act could not be applied, for example, in cases such as that of policemen taking "protection" money from persons operating illegal businesses as it was applied as recently as *United States* v. *Faulkner, et al.*, —— F.2d —— (6th Cir., decided July 9, 1976).

Defendant again earnestly contends that the Hobbs Act cannot be applied here because bribery, as distinguished from extortion, is alleged. The Act defines extortion to include ". . . the obtaining of property from another, with his consent . . . under color of official right." The government contends that, though bribery is alleged, this *is* an obtaining of property from victims, with their consent, under color of official right, within the meaning of the Act.

In *United States* v. *Braasch*, 505 F.2d 139 (6th Cir. 1974), in an opinion by Associate Justice Tom Clark, it is stated (at 151):

> "Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right', and appellants' wrongful use of official power was obviously the basis of this extortion. See United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute 'classic bribery' is not a relevant consideration."

The above quotation contains the following footnote reference (at 151):

> "As appellants themselves point out, 'the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Acts are not mutually exclusive. United States v. Kahn, 472 F.2d 272, 278 (2d Cir. 1973), cert. den., 411 U.S. 982, 93 S.Ct. 2270 [36 L.Ed. 2d 958]."

See also: Stern, "Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion," 3 Seton Hall Law Review 1 (1971).

We therefore again conclude that the kind of bribery alleged in this indictment may be covered by the Hobbs Act.

Defendant also moves to dismiss on the ground that his conduct is privileged under the speech and debate clause of the Tennessee Constitution. The only case that seems squarely to deal with this problem is *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976). In the initial opinions by a three-judge panel, the court held that neither the federal nor the state (Illinois) Constitutions, by their speech and debate clauses, created any immunity or any evidentiary privilege for state legislators prosecuted for official corruption under a federal criminal statute. A majority of the panel held, however, that under Rule 501 of the Federal Rules of Evidence there is a federal common law speech and debate evidentiary privilege, and held that, but for the fact that the privilege had been effectively waived, the defendant therein would have been entitled to have suppressed his statements to investigators and his grand jury testimony. The third member of the panel, concurring in the result, concluded that there was no federal common law evidentiary privilege and therefore did not reach the question of waiver. After an *en banc* hearing, a majority of the court (537 F.2d 957), agreed with the concurring opinion, holding that there is no federal common law evidentiary privilege.

It appears that none of the judges in *Craig* were of the opinion that, in this context, there is an immunity from prosecution created by the speech and debate clauses of the federal or state Constitutions or that there is such an immunity under the federal common law. Thus, even under the minority view in *Craig*, holding that there is an evidentiary privilege, defendant would not be entitled to have the indictment dismissed. Moreover, as was also pointed out in the first *Craig* opinion (528 F.2d at 783), even if the defendant had an immunity from prosecution under the speech and debate clause

for allegedly corruptly introducing a bill, he still could be prosecuted for agreeing to take a bribe to induce him to introduce the bill in the legislature, citing *United States* v. *Brewster*, 408 U.S. 501 at 526.

Defendant particularly relies on *Tenney* v. *Brandhove*, 341 U.S. 367, which is discussed and distinguished in the *Craig* case. We believe that it is enough, in distinguishing *Tenney*, to quote the last sentence in Justice Frankfurter's majority opinion (at 379):

> "We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 [creating civil liability for violation of certain federal civil rights] does not create civil liability for such conduct."

We therefore conclude that defendant is not entitled to have the indictment dismissed because of his speech and debate immunity or privilege.

The other motions in this case filed by the defendant, upon which argument has been had, can be disposed of briefly.

Defendant moves to dismiss the indictment on the ground that he has been denied due process because of indictment delay, that is, contends that such delay was brought about by the prosecution to gain an advantage. In support of the motion, which appears to be limited to Counts III through VI of the indictment, all of which involves alleged incidents in 1972, defendant showed newspaper stories at about that time reflecting, his counsel contended, rumors that there may have been bribes involved in the legislation referred to in those counts. Defendant also contends that information with respect to these alleged crimes was in the hands of another state senator and the then governor of the state in 1972. However, there is no indication whatsoever that the local U. S. Attorney's office had any inculpatory information; on the contrary, the Assistant United States Attorney handling this case stated in open court that the first information his office had of this alleged bribery conduct was a complaint received during the summer of

this year from a political opponent of the defendant. In any event, there has been no showing as of now that the local U.S. Attornye's [sic] office has delayed this prosecution to gain advantage.

Defendant has made a *Brady* motion, seeking all evidence favorable to his cause, which motion will not be granted on the ground that our Court of Appeals has held that such is not proper as part of discovery. The government must recognize, however, that if there is such information, it must be made available to the defendant at such a time that the defendant can take full advantage of it.

Defendant moves for the production of grand jury testimony on the ground that, among others, he may be able to show that the indictment is so unsupported by valid grand jury testimony that it should be dismissed. It is the opinion of the court that the grand jury testimony is not producible on this or any other ground, but again the government must recognize that such testimony may be producible to the defendant, once witnesses who have testified before the grand jury give their testimony at trial, as Jencks Act material.

The defendant has moved to suppress or to produce all evidence with respect to telephonic or other wire communications. Counsel for the government stated at argument that it has no wiretap evidence and that all tapes it has resulted from consent of one of the parties to the conversation. The government has agreed to make all such evidence available to counsel for the defendant.

The defendant has again moved for a bill of particulars, after withdrawing the motion to such effect initially filed. In view of the response of the government to such motion, setting out in considerable detail the government's theory with respect to these counts, the court is of the opinion that the motion for a bill of particulars should be denied.

The defendant has also made a general motion to produce for inspection various items of evidence, and counsel for the government indicated at argument that the government is ready to make available to defense counsel all materials the government has which are normally required to be produced in this court. Accordingly, the order entered pursuant to this memorandum should reflect the government's obligation to make such production.

Lastly, the defendant moved for a continuance of this case from its setting in early December. The ground for the motion is defense counsel's other trial obligations. The court takes note of the fact that the defendant, as a state senator, will be involved with the Legislature from early January until the session of the Legislature terminates around April. This would mean that, if the case is continued, it could not be tried until around May. This would also mean that the defendant, who has been charged with serious crimes with respect to his conduct of his office as a legislator, would be serving during such session of the Legislature without having had these charges resolved. It appears to the court that this is and would be a highly undesirable situation from the point of view of the public interest, and therefore this case should be tried and disposed of when it is presently set. Accordingly, the motion to continue the case will be denied.

Government counsel is instructed to prepare and submit an order reflecting the rulings made by the court.

ENTER this 9 day of November, 1976.

/s/ Bailey Brown
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CR-76-104

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EDGAR H. GILLOCK, DEFENDANT

SUPPLEMENT TO OFFER OF PROOF

[Filed Sept. 19, 1977]

On September 1, 1977, the United States filed an Offer of Proof in this case setting forth fourteen numbered items containing specific categories of evidence or testimony to be tendered at trial. The following is a supplement to item number 11(a), which should be inserted as the second paragraph immediately preceeding the paranthetical paragraph contained in item 11(a):

> Prior to introducing Senate Bill Number 1783, the Defendant induced and caused members of the Tennessee House of Repreesntatives to sponsor and introduce a similar bill in the House.

Respectfully submitted,

W. J. MICHAEL CODY
United States Attorney

BY: /s/ Glen Reid, Jr.
GLEN REID, JR.
Special Assistant

CERTIFICATE OF SERVICE

This is to certify that I have, this 19th day of Sept., 1977, served a copy of the foregoing instrument on Hal Gerber, Esq., 100 N. Main Bldg., #3121, Memphis, Tennessee, 38103; and James Neal, Esq., Third National Bank Building, Nashville, Tennessee, 37219, Attorneys for Defendant, by U.S. Mail, postage prepaid.

/s/ Glen Reid, Jr.

SUPREME COURT OF THE UNITED STATES

No. 78-1455

UNITED STATES, PETITIONER

v.

EDGAR H. GILLOCK

ORDER ALLOWING CERTIORARI. Filed May 14, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 295082 5

Supreme Court, U. S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDGAR H. GILLOCK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDGAR H. GILLOCK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Respondent agrees with Petitioner's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

Is a State Legislator, who is a defendant in a federal criminal prosecution, entitled to a speech or debate privilege according to the principles of the common law, as interpreted in light of reason and experience?

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Petitioner has accurately stated the pertinent constitutional provisions and the rules applicable in this action, although it has not set forth the Tenth Amendment to the United States Constitution, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

COUNTERSTATEMENT OF THE CASE

The Petitioner's statement of this case does not accurately set forth the substance of the pending allegations and overstates the scope of the suppression order. Subject to these exceptions and without admitting the truth of any of the factual allegations,[1] Petitioner's statement of the case is accepted. Accordingly, Respondent submits the following points for the purpose of clarification.

A. The Allegations.

Two separate categories of alleged transactions provide the basis for the indictment in this action. Count One purports to charge an offense pursuant to 18 USC § 1951 on the grounds that Senator Gillock:

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[1] This case comes before the Court as an appeal by the Government from an order suppressing evidence entered prior to the trial of this matter, pursuant to 18 U.S.C. §3731. Accordingly, the Government's broad characterization of the proof as "respondent's extortion scheme", Petitioner's Brief at 9, is their own, and not the result of a finding by a jury or the Court. Respondent has entered a plea of not guilty, and will dispute the truth and accuracy of these statements to the fullest possible extent at the trial of this matter.

> [u]nder color of official right, as an elected member of the Tennessee General Assembly holding the position of Senator . . . [attempted] to obtain money . . . by preventing the transportation of James Michael Williams from the State of Tennessee. . . .

Count Two charged the same actions, in substance, and has been dismissed.[2]

With respect to these charges, it should be noted that Senator Gillock, who had no authority under the Tennessee Constitution to block or otherwise challenge the Governor's extradition power, *State v. Grosch*, 177 Tenn. 619, 152 S.W.2d 239 (Tenn. S.Ct. 1941), allegedly requested an opinion from the Attorney General of Tennessee on whether extradition could be ordered for "Extradition on a Misdemeanor." (App. A at 43a)[3]

The second so-called "scheme" referred to in Counts Three through Six in the indictment was not allegedly "to procure master electrician's licenses for four individuals", Petitioner's Brief at 4, but to sponsor legislation which would provide for the reciprocity of electrician's licenses between various counties in Tennessee. (App. A. at 46a-49a)

---

[2] Count Two, which purported to charge an offense under 18 U.S.C. §1952, has been dismissed by the District Court for failure to state an offense and the United States Court of Appeals for the Sixth Circuit dismissed an appeal by the Government on the grounds that the appeal was not timely filed. This count charged Senator Gillock with "agreeing to exercise influence under color of his office . . . in order to intercede taking advantage of deference accorded him and prerogatives available to him. . . ." in such a way as to prevent extradition. Although this count alludes to "an attempt to distribute the proceeds of a bribe," there is no allegation that a bribe was acually made or tendered.

[3] Parenthetical references to "App." refer to the appendices of Petitioner's Brief.

B. **The Suppression Order**

The Petitioner's characterization of the suppression order overstates the effect of the suppression order on the Government's case. When the District Court entered its order of suppression, the Government was given great latitude in its proof, and the Court of Appeals further expanded the Government's right to introduce evidence. Among the "few limited items," Petitioner's Brief at 5, which were not suppressed by the District Court (and are not mentioned in the Petitioner's Brief) is proof that:

> Approximately two weeks after the initial meeting the defendant called and asked the four individuals to come to his office. The defendant advised them that he had a way to enable them to obtain a master's license but that it would cost them $5,000 each. The defendant explained that he could cause legislation to be enacted by the Tennessee General Assembly which would provide for reciprocity in licensing. The legislation would enable an individual who could not pass the difficult test in Shelby County, or Memphis, to obtain a license in another county, or municipality, where the test was not as difficult, and then require the larger county or municipality to recognize the master's license obtained elsewhere. The defendant explained that the $5,000 fee would be on a contingency basis, that is, if the individuals, or at least one of them, did not obtain their master's license within one year, their money would be refunded. Shortly thereafter, two of the four individuals put $5,000 in escrow pursuant to the defendant's proposition. One of the individuals had the defendant execute a written agreement. (A copy of that agreement is attached as Exhibit I.)

(Item No. 10, App. A at 46a-47a) The suppression order and the Government's offer of proof (App. A. at 39a-51a; App. E at

59a-64a) further demonstrate the wide latitude granted to the Government by the District Court's decision. Further evidence that the Government overstates the impact of the Court's order is the fact that, at the time the District Court's Order of Suppression was entered, the Government advised the Court that it was prepared to go to trial on the basis of the proof which had not been suppressed (App. E at 74a).

The Petitioner's discussion of the opinion below casually suggests that the Sixth Circuit expressly held that two other Courts of Appeal have "squarely held" that Rule 501 does not encompass the privilege, Petitioner's Brief at 6. This is correct insofar as the Court of Appeals found that two other Courts of Appeal "supply well-argued opinions on both sides of the general question we confront here." (App. A at 15a.) The petitioner's statement does not taken into account that the Sixth Circuit also noted the Third Circuit opinion in *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977) and that:

> [T]he long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming Chief Judge Brown in his protection of the privilege in this case.

(App. A at 15a.)

REASONS FOR DENYING THE WRIT

Petitioner has asked this Court to grant its petition for a writ of certiorari on the grounds that the issue of a legislative privilege is "an important and recurring question" and that the opinion below "squarely conflicts with the decisions of two other courts of appeals." Petitioner's Brief at 7. Although there is an apparent conflict between the opinions of the Sixth and Third Circuits on the one hand and the Seventh and First Circuits on the other hand, upon close scrutiny the Sixth and Third Circuits are the only Courts to squarely address this issue. More importantly, the Sixth and Third Circuits agree that there is a federal common law speech or debate privilege for a state legislator.

Despite the apparent breadth of the Seventh and First Circuit opinions, the privilege issue is collateral to other issues presented therein, such as waiver, and they therefore do not stand in direct conflict with the opinions of the Sixth and Third Circuits. Moreover, notwithstanding even an apparent conflict, it is clear that the common law, as interpreted in light of reason and experience, supports both the opinion below and the opinion of the Third Circuit and that there is no need for this Court to address this issue.

A. The Decisions of the Other Circuits

1. The Seventh Circuit case of United States v. Craig and the First Circuit case of United States v. DiCarlo involve collateral issues.

Although two circuits may have suggested that they would not follow the Sixth Circuit's rule, they do not squarely address this issue. First, in *United States v. Craig*, 528 F.2d 773 (7th Cir.), *cert. denied*, 425 U.S. 973 (1976) (Craig I), *rev'd*, 537 F.2d 957 (*en banc*), *cert. denied* 429 U.S. 999 (1978) (Craig II), even the four judges of the Seventh Circuit who recognize the privilege agreed that the state legislator had waived any legislative privilege he might otherwise assert by testifying before the grand jury. Accordingly, it can be argued that it was unnecessary to determine whether in fact there was a privilege. In the instant case there is no issue of waiver and the issue of the legislative privilege has been preserved by a Motion to Suppress.

There is no issue of waiver in *United States v. DiCarlo*, 565 F.2d 802 (1st Cir. 1977), *cert. denied*, 435 U.S. 924 (1978), but a different principle is involved. In *DiCarlo*

> the charges against DiCarlo were not "based" on his legislative conduct, but on his conduct outside of the legislature. . . .

565 F.2d at 805. Although the Court rejected the privilege, it did so on the narrow grounds that:

> it should not be extended when the crime itself was entirely outside of any legislative act, and the conduct assertedly immunized[4] was introduced for its corroborative evidentiary effect.

565 F.2d at 806. After reaching its decision on these narrow grounds, the Court expressed its agreement with the dissent in the Third Circuit that "[i]f there is (no limitation . . . on

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[4] The Court uses the terms "privilege" and "immunity" interchangeably, without apparently recognizing the difference in the two concepts as an evidentiary matter. The Court even goes so far as to state that "no civil or criminal action will lie for whatever a [federal] legislator says on the floor," 565 F.2d at 805, *citing United States v. Johnson*, 383 U.S. 169 (1966). On the contrary, the speech or debate privilege does not "make Members of Congress super-citizens, *immune from criminal responsibility.*" *United States v. Brewster*, 408 U.S. 501, 516 (1972) (emphasis supplied).

enforcement), we see no basis for creating a limitation that handicaps proof." 565 F.2d at 807.

The Third Circuit might recognize a different rule if the Government's case is "based on" legislative acts or if this issue had been raised pre-trial. In any event, given the Court's careful division of items of proof into legislative and non-legislative categories (which is unnecessary if the Court flatly rejects the privilege), *DiCarlo* stands for the proposition that the use of the legislative evidence was harmless; it was unnecessary to determine if the admission of the evidence was improper. *See Kotteakos v. United States,* 328 U.S. 750 (1946).

2. **The Third Circuit Case of In Re Grand Jury Proceedings.**

Finally, the Petitioner has dismissed the *In re Grand Jury Proceedings,* 563 F.2d 577 (3d Cir. 1977), holding as dictum and, further, has improperly characterized that holding as recognition of a "somewhat circumscribed privilege." Petitioner's Brief at 9, n. 5. On the contrary, *In re Grand Jury Proceedings* clearly holds that a legislative privilege applies *in a grand jury proceeding* and defines it as the "personal privilege" of a legislator to exclude *"any evidence* of his action performed in a strictly legislative capacity, motivations for such action, or utterances in the course of his legislative duties." 563 F.2d at 585 (emphasis supplied). The existence *vel non* of the legislative privilege was the threshold consideration in *In re Grand Jury Proceedings,* and the Court was required to make this initial determination without reference to the weight of the evidence, as in *DiCarlo,* or the fact of waiver, as in *Craig.*

It is noteworthy that the privilege was applied to evidence presented to a grand jury, which traditionally has broad investigatory powers and to which the Exclusionary Rule has not been applied. *See United States v. Calandra,* 414 U.S. 338, 349-50 (1974); *Costello v. United States,* 350 U.S. 359 (1956). The Court reiterated the importance of its holding:

> Though it may hamper somewhat prosecution of the few who are guilty of betraying the public trust, the privilege is needed to protect the great majority of legislators who are conscientious in the performance of their duties.

563 F.2d at 583.

Accordingly, there is no "square conflict" between the circuits on this issue. The only two circuits to squarely face this issue, the Third Circuit and the Sixth Circuit, have agreed and have upheld the legislative privilege.

B. **The Opinion of the Sixth Circuit Correctly Analyzes the Common Law History of the Privilege, and Recognizes the Existence of the Privilege**

1. **The privilege is a limited one, and does not foreclose prosecution.**

The Petitioner is correct in its assertion that the opinion below will "impair" the Government's ability "to prosecute venal state legislators," Petitioner's Brief at 7; indeed, the principle of legislative privilege will even "impair" the Government's ability to prosecute innocent state legislators.[5] However, this "impairment" does not rise to the level of an immunity. The Court of Appeals carefully reviewed the material suppressed by the District Court, reversed the suppression order in part, and expanded the categories of proof which will be admissible at trial.

---

[5] A limitation on the Government's proof is hardly improper merely because it is a limitation. A privilege, of course, always constitutes a limitation on proof and, although a privilege may give an advantage to one party, and may even appear unfair in a particular case, the reason and experience of the common law have shown that in certain instances there are higher principles to be served than the right to every person's evidence. As this Court has noted " 'the public . . . has a right to every man's evidence,' *except for* those persons protected by a constitutional, common-law, or statutory privlege." *Branszburg v. Hayes,* 408 U.S. 665, 688 (1972) (emphasis supplied).

In any event, the impairment upheld herein is no greater than would be required if Respondent were a federal legislator. The Courts below merely "viewed the state legislative privilege as being on a parity with the similar federal privilege. . . ." *United States v. Johnson, supra* at 180; *see Imbler v. Pachtman,* 424 U.S. 409, 419, n. 15 (1976); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* No. 77-1327, 47 U.S.L.W. 4256 (March 5, 1979).

Furthermore, and contrary to the Petitioner's implication, the decision *sub judice* does not involve immunity from prosecution and, on the basis of the record in this case, the privilege recognized certainly would not bar this prosecution. *See United States v. Johnson, supra; United States v. Brewster,* 408 U.S. 501, 512 (1972).

2. **This Court and Federal Common Law Have Consistently Recognized the Necessity for a Legislative Privilege.**

The only issue in this case is whether "the principles of the common law" compel recognition of this Respondent's legislative privilege in a federal criminal proceeding "in the light of reason and experience." Rule 501, Fed. R. Evid. Such a common law principle is hardly "inconsistent with the relevant precedents of this Court," Petitioner's Brief at 7, and has in fact been recognized as the source of civil immunity in federal civil actions against state legislators. In this term, the Court approved its prior holding in *Tenney v. Brandhove,* 341 U.S. 367 (1951), and stated that "such [civil] immunity *was consistently recognized in the common law* and was taken as a matter of course by our Nation's founders." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* No. 77-1327, 47 U.S.L.W. 4256, 4259 (March 5, 1979). The Court recognized that the federal Speech or Debate clause, U.S. Const. Art. I, §6, is not applicable to state legislators, *id.* at 4260, and that the "States are of course free to adopt similar clauses in

their own Constitutions, and many have in fact done so." 47 U.S.L.W. at 4260. These clauses, in and of themselves, ". . . reflect the central importance attached to legislative freedom in our Nation." *Id.* Most importantly,

> the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal [common] law; the decision did not depend on the presence of a speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators.

Id. It was further noted that "[u]nderlying the decision in *Tenney* was a recognition of the unique status of the legislative privilege, maintained for several centuries at common law and enshrined in the Federal Constitution, Art. I, §6, as well as in all but seven of the States' constitutions." *Id.* (Marshall J., dissenting in part).[6]

Both *Lake Country* and *Tenney* are civil actions and, in civil actions, the common law gives rise to immunity for "federal, state, and regional legislators." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra* at 4260. The federal common law principle which is the source of the civil immunity also gives rise to a limited evidentiary privilege in a criminal proceeding, since

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[6] Forty-three of the states have specific provisions in their constitutions protecting the speech or debate privilege. *See, Tenney v. Brandhove, supra* at 375, n. 5; Alaska Const. Art. II, §6; Hawaii Const. Art. III, §8. Two states, Iowa and North Carolina, specifically provide for the speech or debate privilege by statute. Iowa Code §2, 23 (1967), Gen. Stats. N.C. §120-9 (1974). In addition, California, Mississippi, Nevada and South Carolina provide for a privilege from arrest for legislators. *Tenney v. Brandhove, supra* at 375, n. 5. Only Florida has no specific statutory constitutional provision concerning legislative privilege but the courts may recognize a common law privilege in that state. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1256, n. 8 (5th Cir. 1976).

> [i]t is apparent from the history of the clause that the privilege was not born primarly of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

United States v. Johnson, 383 U.S. 169, 180-81 (1966). Moreover, this Court has recently held that

> when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch. *Kilbourn v. Thompson; Tenney v. Brandhove; Doe v. McMillan; Dombrowski v. Eastland.* (citations omitted)

Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975). Accordingly, if civil immunity is recognized for a state legislator in a federal civil action, on the basis of federal common law, then a state legislator who is a defendant in a federal criminal proceeding is entitled to an evidentiary privilege on those same principals of federal common law. *United States v. Johnson, supra,* at 180-81.

The necessity for the privilege is underscored by the nature of the delicate state-federal relationship, and our form of government is based on

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971); *see* U. S. Const. Amend. X. In coordinate branches of either the state or federal

governments, one branch may exercise its check against the other. Thus a federal legislator may not only assert his privilege but also vote to reject the legislative programs of the executive or to limit the jurisdiction of the judiciary. A state ~~legislat~~or has no such countervailing power and is literally at the mercy of the federal government.

History has shown that the unenforceable promises of good faith by the executive are insufficient to secure the liberty of thought and expression which are necessary for the proper functioning of the state legislatures. At the inception of our form of government surely the states never conceived that by joining the Union they would forfeit the legislative independence which flows from the speech or debate privilege of common law since "[t]he provision in the United States Constitution was a reflection of political principles already firmly established in the States." *Tenney, supra* at 373. Thus,

> [a]s other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act *without fear of criminal and civil liability.*

Id. at 375 (emphasis supplied). This privilege is essential so that legislators may "[e]xecute the functions of their office without fear of prosecutions, *civil or criminal.*" *Tenney, supra* at 374 (emphasis supplied).

Accordingly, the federal common law recognizes a privilege for a state legislator in a federal criminal proceeding. The privilege in a criminal case and immunity in a civil case are both products of centuries of "reason and experience." If there is any absence of authority in support of Respondent's contentions, it is only because "the tradition of legislative privilege is so well established in our policy, there is very little judicial illumination of this clause." *United States v. Johnson, supra* at 179.

CONCLUSION

The opinion of the Court of Appeals is correct, and the Petition for a Writ of Certiorari should be denied.

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No. 78-1455

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 587 F.2d 284. An earlier memorandum opinion of the court of appeals remanding the case for further proceedings (Pet. App. 56a-58a) is not reported; the judgment order in that case is reported at 559 F.2d 1222 (table). The opinions of the district court (Pet. App. 59a-74a; A. 8-19) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52a-53a) was entered on November 1, 1978. A timely petition for rehearing was denied on January 17,

1979 (Pet. App. 54a-55a). On February 7, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including March 18, 1979 (a Sunday). The petition was filed on March 19, 1979, and was granted on May 14, 1979 (A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Rule 501 of the Federal Rules of Evidence encompasses a common-law "legislative privilege," similar to that under the Speech or Debate Clause of the Constitution, that prohibits the federal government from adducing evidence of the legislative acts of a state legislator in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Article I, Section 6, cl. 1, of the United States Constitution provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Article II, Section 13 of the Tennessee Constitution provides:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

STATEMENT

1. On August 12, 1976, respondent, then a Tennessee state senator, was indicted in the United States District Court for the Western District of Tennessee on five counts of obtaining money under color of official right (18 U.S.C. 1951), one count of using an interstate facility to distribute a bribe (18 U.S.C. 1952), and one count of participating in an enterprise through a pattern of racketeering activity (18 U.S.C. 1962).[1] The indictment was based on respondent's alleged abuse of his legislative position to extract money from victims in two separate schemes—the first to prevent the extradition of a Tennessee prisoner to Illinois, the second to enact legislation that would enable four individuals to procure master electrician's licenses (Pet. App. 3a-4a; A. 3-7).

Before trial, respondent moved to suppress evidence of his legislative acts performed in connection with the alleged extortion schemes.[2] Respondent claimed

[1] On October 5, 1976, the district court dismissed the count based on the Travel Act, 18 U.S.C. 1952. The court concluded that the facts alleged in the indictment did not constitute a violation of the Tennessee bribery statute (Tenn. Code Ann. § 39-802 (1975)), and that therefore the indictment failed to allege a violation of the Travel Act (A. 8-9). Alternatively, the court held that the count was defective because the government had failed to allege sufficiently (1) that respondent had used interstate facilities with intent to distribute the proceeds of an unlawful activity, and (2) that thereafter respondent had attempted to distribute those proceeds (A. 9). The correctness of these rulings is not before the Court.

[2] Previously, respondent had moved to dismiss all counts of the indictment on various grounds. On October 5, 1976,

that a common law privilege for state legislators, equivalent in scope to the protection afforded federal Congressmen under the Speech or Debate Clause, precludes the federal government from introducing any evidence of "legislative acts or motivation therefor" in a federal criminal trial (Pet. App. 59a). The district court granted the motion, holding that a common law privilege akin to the Speech or Debate Clause privilege exists under Rule 501 of the Federal Rules of Evidence. The court stated that such a legislative privilege is necessary "to protect the integrity of the [state] legislative process by insuring the independence of individual legislators * * * [and] to preserve the constitutional relation between our federal and state governments in our federal system" (Pet. App. 73a).

2. The government appealed, and the court of appeals vacated the district court's blanket ruling and remanded for a more specific finding with regard to particular items of the government's proposed case (Pet. App. 56a-58a). On remand, the government tendered an offer of proof setting forth with specificity the evidence to be relied on by the prosecution in attempting to establish respondent's extortion of money

the district court granted this motion only as to the second count of the indictment (A. 8-13). See note 1, *supra*. Subsequently, on November 9, 1976, the court denied respondent's renewed motion to dismiss on the basis of his claimed legislative immunity from federal criminal prosecution (A. 16-17). In addition, the court rejected respondent's contentions regarding preindictment delay (A. 17-18) and the coverage of the Hobbs Act, 18 U.S.C. 1951 (A. 14-16).

under color of official right, in connection with the extradition of a Tennessee prisoner and legislation concerning electrician license reciprocity (Pet. App. 39a-51a).

The extradition matter arose out of the arrest in Memphis, Tennessee in November 1974 of a fugitive from Illinois named James Michael Williams. The government proposed to demonstrate that in January 1975 Williams' attorney, John Hundley, told Williams' sister, Ruth Howard, that "he had a 'friend' who could help her brother, but it would 'cost a small sum of money'" (Pet. App. 41a). Howard subsequently met with respondent on several occasions and was told that respondent required $2,500 for his assistance. Thereafter Howard and Williams gave respondent and Hundley a $1,500 promissory note and promised to pay another $1,000 in cash. Respondent, in turn, acted to block Williams' extradition. He attended Williams' extradition hearing on March 6, 1975, reviewed the case file, and questioned the Assistant Attorney General for the state on various matters, including the propriety of extraditing a prisoner for a misdemeanor.[3] Later that day, respondent made an official request for an opinion of the Tennessee Attorney General regarding extradition on a misdemeanor charge (Pet. App. 41a-44a).[4]

---

[3] Williams had escaped from an Illinois state prison while serving a sentence for a misdemeanor (Pet. App. 42a).

[4] Under Tennessee law, a state senator is apparently entitled to make an official request for such an opinion. On March 27, 1975, the Attorney General issued an opinion in response to the request (Pet. App. 43a).

In addition, the government sought to introduce into evidence several tape recordings of face-to-face and telephonic conversations on March 18, 19, 21 and 25, 1975, between Howard and Hundley and between Howard and respondent. In these taped conversations, respondent asserted that he could have blocked Williams' extradition by exerting pressure on the extradition hearing officer when that officer appeared before a senate committee of which respondent was a member to discuss a budget request. Respondent had not done so, however, because Howard had not reached Memphis in time to pay respondent the $1,000 in cash. Finally, the government alleged that respondent had attended a meeting of the senate judiciary committee on March 19, 1975, and that the extradition hearing officer had presented his department's budget request to the committee at that meeting (Pet. App. 44a-45a).

The government's offer of proof also described in detail respondent's participation in an extortion scheme regarding master electricians' licenses. At a meeting in his office in early 1972, respondent allegedly demanded $5,000 from each of four electricians as the quid pro quo for the introduction and passage of legislation that would have facilitated the licensing of these electricians in Shelby County, Tennessee (Memphis). The electricians had previously failed that county's licensing examination. The legislation would have established a system of reciprocity for county and municipal electrician licenses in the State of Tennessee, thereby enabling the electricians to work lawfully in Memphis by passing an easier

test in another jurisdiction. Two of the electricians paid respondent $5,000 on condition that the legislation be enacted, and respondent executed a written agreement to that effect. Respondent subsequently introduced such legislation in the senate, arranged for the introduction of a similar bill in the Tennessee house of representatives, and guided the bill through the legislature to passage. At that time several private individuals met with respondent to voice their opposition to his bill. Respondent informed them that he had accepted fees for this legislation and could not afford to withdraw the bill. The governor, however, subsequently vetoed the bill, and the senate failed to approve respondent's motion to override the veto (Pet. App. 46a-49a; A. 20).

3. The district court granted respondent's renewed motion to exclude evidence of his legislative acts. The court concluded that much of the government's offer of proof is inadmissible under Rule 501 of the Federal Rules of Evidence. Thus, the court held that respondent's official request for an opinion of the Attorney General regarding extradition and the answer to that request constituted legislative acts. Similarly inadmissible, according to the district court, are respondent's statements to Howard that he could have held up the extradition because the extradition hearing officer appeared before his senate committee and also proof that the hearing officer actually did testify before respondent's committee. The court further ruled inadmissible all evidence regarding the electrician licensing legislation, including respondent's introduc-

tion of the legislation, his conversations with private individuals who opposed the legislation, and the governor's veto message (Pet. App. 59a-64a).

4. The government again appealed. A divided court of appeals recognized a legislative privilege under Rule 501, and substantially affirmed the district court's rulings excluding portions of the government's proposed evidence.[5] In reaching its conclusion, the court initially stated (as the parties had previously conceded) that neither the Tennessee constitutional provision regarding legislative privilege nor the federal Speech or Debate Clause directly applies to a federal prosecution of a state legislator (Pet. App. 2a-3a). The court also noted that this Court has never passed upon the existence of a common law legislative privilege and that two other courts of appeals had squarely held that Rule 501 does not encompass such a privilege (*id.* at 15a). Nonetheless, the court concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that his-

[5] The court of appeals, relying on this Court's pertinent Speech or Debate Clause cases, reversed the district court as to (1) the opinion of the Tennessee Attorney General regarding the extradition of one of respondent's alleged victims, (2) testimony of conversations between (a) respondent and Howard, and (b) respondent and opponents of the electrician licensing bill, and (3) the governor's veto message (Pet. App. 16a-26a). Although we do not agree with all aspects of the court of appeals' application of the legislative privilege (see *United States* v. *Johnson*, 383 U.S. 169, 172 (1966); *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979), slip op. 14-18), we have not asked this Court to review the rulings below on specific items of evidence. See Pet. 5 n.1.

tory in the cases [of the Supreme Court]" justify recognition of a common law privilege in the context of a federal criminal prosecution of a state legislator (*ibid.*).[6]

Judge Weick dissented, believing that "the federal courts ought not to innovate and create a new privilege for the protection of state legislators who violate the criminal laws of the United States" (Pet. App. 26a-27a). Judge Weick explained that because the speech or debate privilege emerged as a means of ensuring the independence of coordinate branches of the same government, the doctrine of separation of powers does not justify extending the privilege to the context of federal prosecutions of state legislators (*id.* at 31a-33a).

SUMMARY OF ARGUMENT

This case raises the issue whether Rule 501 of the Federal Rules of Evidence encompasses an evidentiary privilege that bars the admission of evidence of a state senator's legislative acts at his federal criminal trial. Such a legislative privilege is essentially unprecedented. The federal government has regularly prosecuted corrupt local officials, including state legislators, and has routinely used evidence of their official acts when those acts are probative of the commission of a federal crime. *E.g.*, *Anderson* v. *United States*, 417 U.S. 211, 214-215 (1974); *United States*

[6] In particular, the court cited *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *United States* v. *Brewster*, 408 U.S. 501 (1972).

v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975). This Court has never suggested that state legislators enjoy an evidentiary privilege akin to that provided by the Speech or Debate Clause for federal Congressmen, and, indeed, the proposed rules of evidence promulgated by the Court in 1972 did not include such a privilege.

Not only is a legislative privilege unprecedented, but it is also unwarranted. Rule 501 provides that except as required by the Constitution, an Act of Congress, or rules prescribed by the Court, evidentiary privileges are to be "governed by the principles of the [federal] common law as they may be interpreted * * * in the light of reason and experience." It is a well established precept of the common law of privileges that the public has the right to every man's evidence and that therefore privileges are to be eschewed except in the most compelling of circumstances. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). As the Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 710: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

It is undisputed that the Speech or Debate Clause does not confer any privilege on state legislators. Nonetheless, respondent and the court of appeals (Pet. App. 15a) suggest that "the long history and

the felt need for protection of legislative speech or debate" support recognition of such a privilege. However, careful analysis of the relevant precedents of this Court and the history of the Speech or Debate Clause establishes that the legislative privilege sought by respondent would not materially serve the policies that inform the Speech or Debate Clause. To the contrary, acceptance of respondent's contentions would cast legislative privilege adrift from its traditional moorings.

First, the Speech or Debate Clause, as well as its English counterpart, is historically a source of legislative immunity. In this century the Clause has, in addition, been construed to constitute an evidentiary privilege. That privilege serves essentially as a prophylaxis to guard against invasions of the underlying immunity. Where there is no immunity, on the other hand, a legislator acts at his own peril and may be forced to defend his non-immunized actions in a court of law. See, *e.g.*, *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979); *Gravel* v. *United States*, 408 U.S. 606 (1972). Accordingly, where there is no immunity there is no historical or logical basis for recognizing an evidentiary privilege.

Although the federal law affords state legislators, judges, and prosecutors an absolute *civil* immunity, those officials enjoy no immunity from the federal criminal law. As the Court explained in *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974):

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates [criminal immunity]. * * * On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress * * *."

Because respondent, unlike a federal Congressman, is subject to federal criminal liability for his legislative acts, it is senseless to preclude the federal government from adducing evidence of those acts at his criminal trial.

Moreover, even if the federal law did recognize a criminal immunity for state legislators, it does not follow that respondent is entitled to an evidentiary privilege as well. The Speech or Debate Clause is a constitutional mandate, whereas respondent at best enjoys a common law immunity, and the pertinent decisions of this Court suggest that the latter is not to be construed as broadly as the former. In particular, it is not at all apparent that a common law immunity necessarily encompasses an evidentiary privilege similar to that associated with the Speech or Debate Clause. To the contrary, where, as here, the federal government prosecutes a state legislator for essentially non-legislative acts, there appears to be no compelling justification for barring introduction of the defendant's legislative acts solely to corroborate his non-immunized extra-legislative crime. The risk that such evidentiary use will significantly trench upon the independence of state legislators is simply not substantial enough to justify the cost that

the privilege would entail for the administration of criminal justice in the federal courts.

The tradition of speech or debate privilege in this country does not support creation of a legislative privilege for still another reason. As the Court has often reiterated, the Speech or Debate Clause is predicated on the separation of powers doctrine. See, *e.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13. Here, however, the federal government as a whole is acting to punish an individual state legislator for a violation of federal law. Since this prosecution, like the federal prosecution of a corrupt state judge or governor, does not implicate the separation of powers concerns that inform the Speech or Debate Clause, the courts below erroneously concluded that respondent's claim of privilege derives sustenance from this Court's Speech or Debate Clause jurisprudence.

Finally, respondent wrongly relies on the principles of federalism. It cannot reasonably be contended that the federal prosecution of an individual state legislator for essentially non-legislative acts violates the Tenth Amendment. Since respondent's alleged conduct is proscribed by both state and federal law, the instant prosecution (including use of evidence of his legislative acts) cannot fairly be described as displacing essential and traditional state policies. Compare *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Nor is there any serious doubt about the constitutionality of federal evidentiary rules that derogate state evidentiary privileges. See *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965); Fed. R. Evid. 501. Finally, without denigrating the interest of the states in forthright and uninhibited performance of legislative duties, the same state interests in the case of judges and prosecutors—who, like legislators, are afforded absolute common law immunity from civil suit—has not been deemed sufficient to shield such officials from federal prosecutions implicating their official acts. Since federal prosecution of such officials poses essentially the same danger (de minimis in our view) of inhibiting them in the due discharge of their important official functions as does federal prosecution of legislators, principles of federalism supply little basis for creating a privilege unique to state legislators.

ARGUMENT

RULE 501 OF THE FEDERAL RULES OF EVIDENCE DOES NOT ENCOMPASS A COMMON LAW EVIDENTIARY PRIVILEGE THAT BARS PROOF OF A STATE SENATOR'S LEGISLATIVE ACTS IN A FEDERAL CRIMINAL TRIAL

It is a well recognized principle of federal jurisprudence that testimonial privileges are not to be lightly created or expansively construed (see pages 20-24, *infra*). Nevertheless, the court of appeals has in this case endorsed a new evidentiary privilege that would bar the admission of evidence of a state senator's legislative acts at his federal criminal trial. The decisions of this Court contain no suggestion that such a privilege exists or should be created;

moreover, the rules of evidence proposed by this Court in 1972 did not include a privilege for state legislators. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 230-261 (1972). Although Congress ultimately determined not to adopt any rules specifically defining evidentiary privileges, see H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973), the absence of a legislative privilege in the proposed rules suggests the unprecedented nature of the privilege recognized by the court of appeals. See 2 *Weinstein's Evidence* ¶ 501[02], at 501-20.5 (1979). Cf. 78 Harv. L. Rev. 1473, 1474 n.6 (1965).[7]

In concluding that respondent may not be questioned about his legislative acts (even though they constitute relevant evidence of a federal crime), the court of appeals relied heavily on opinions of this Court construing the Speech or Debate Clause of the United States Constitution, Art. 1, Sec. 6, cl. 1 (Pet. App. 8a-15a). That reliance is misplaced. As we demonstrate below (pages 24-44), the doctrines of

[7] Our research reveals that the first appellate court to suggest the existence of a legislative privilege was a divided panel of the Seventh Circuit in *United States* v. *Craig*, 528 F.2d 773, cert. denied, 425 U.S. 973 (1976). The en banc Seventh Circuit subsequently reversed, adopting the concurring opinion of Judge Tone rejecting the propriety of recognizing such a privilege. 537 F.2d 957, cert. denied, 429 U.S. 999 (1976). Thereafter, the First and Third Circuits took opposing views on this issue. Compare *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978), with *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977); but see *id.* at 586 (Gibbons, J., concurring) (rejecting "majority's dictum" concerning legislative privilege).

immunity and separation of powers that inform the Speech or Debate Clause are not implicated by the federal government's proof of a state senator's legislative acts at his criminal trial. Nor, as respondent suggests (Br. in Opp. 12), is a common law legislative privilege justified "by the nature of the delicate state-federal relationship." See pages 44-52, *infra*. In short, neither precedent, reason, nor experience supports the creation of a federal common law privilege barring proof of legislative acts of a state legislator.

A. Rule 501 Does Not License The Courts To Create And Expand Evidentiary Privileges, Except In Compelling Circumstances.

1. *Rule 501 governs the creation of federal evidentiary privileges*

At the outset, we note what has been common ground in this litigation to date: the existence vel non of a legislative privilege in a federal criminal trial is a question of federal common law governed by Rule 501 of the Federal Rules of Evidence.[8] Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States * * * the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." The one federal constitutional provision arguably

[8] Both the court of appeals (Pet. App. 3a) and respondent (*ibid.*; Resp. Br. in Opp. 10) have concurred in this view.

governing respondent's claim of privilege is the Speech or Debate Clause. But that Clause by its own terms protects only federal Congressmen and is therefore not applicable to state legislators. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, No. 77-1327 (March 5, 1979), slip op. 12; *United States* v. *DiCarlo*, 565 F.2d 802, 805 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978); *In re Grand Jury Proceedings*, 563 F.2d 577, 580-581 (3d Cir. 1977).[9]

Moreover, the existence of a legislative immunity in the Tennessee constitution akin to the Speech or Debate Clause does not control the disposition of this case. Even before the promulgation of Rule 501, the admissibility of evidence in a federal criminal trial—including the question of privileges—was not governed by the "local rules in * * * the particular state where the trial takes place, but [was] governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience." *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934). See also *Ker* v. *California*, 374 U.S. 23, 31 (1963); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring); *Funk* v. *United States*, 290 U.S. 371 (1933). Rule 501, which is derived from former Rule 26 of the Federal

[9] Rule 501 also makes exception for privileges "provided by Act of Congress or in rules prescribed by the Supreme Court * * *." No such statute or rule applies to this case.

Rules of Criminal Procedure (1971)[10] and the language in *Wolfle* quoted above, merely codifies this long-established approach to evidentiary privileges in federal criminal trials. And, given the Supremacy Clause, the express language of Rule 501 establishes that the existence of a particular state evidentiary privilege does not determine the application and existence of evidentiary privileges in the federal criminal context.[11] Thus, the issue of legislative privilege, like the issue of legislative immunity under the Civil Rights Act, 42 U.S.C. 1983, does "not depend on the presence of a Speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra*, slip op. 13.[12]

[10] Former Rule 26 provided in pertinent part:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

[11] *In re Grand Jury Proceedings, supra*, 563 F.2d at 582; *United States* v. *Craig*, 528 F.2d 773, 781 (7th Cir.) (Tone, J., concurring), cert. denied, 425 U.S. 973 (1976), adopted, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 7 (1974); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973); 2 *Weinstein's Evidence* ¶ 501[03], at 501-24 to 501-25 (1979).

[12] This is not to say, however, that in all contexts the federal courts, in formulating federal rules of evidence, must necessarily ignore the presence or absence of a privilege under

2. *The federal common law reflects a measured hostility to the creation and extension of evidentiary privileges*

Although this Court has considered questions of evidentiary privilege on several prior occasions, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), it has never given plenary consideration to Rule 501.[13] In *Fisher* v. *United States*, 425 U.S. 391, 402 n.8 (1976), however, the Court observed that Rule 501 incorporates the "principles of the common law" and that therefore questions concerning evidentiary privileges will depend upon the application of existing authority "interpreted * * * in the light of reason and experience." Fed. R. Evid. 501. Accordingly, the Court's prior decisions involving creation and application of testimonial privileges provide significant

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state law. In the present context, it would seem somewhat incongruous for federal courts to afford a privilege to state legislators that they would not enjoy in their own courts, since the marginal contribution of such a rule to legislative independence would be slight whenever there existed no constraints upon state court inquiry into legislative acts. Of course, nothing in Rule 501 precludes adoption of a general federal rule under which a state legislator would be afforded a privilege as broad as, but no broader than, that available in the courts of his state. While such an approach was evidently deemed inappropriate in connection with the issue before the Court in *Lake Country Estates*, the selection of the proper federal rule should depend upon an evaluation of the federal and state policies at stake in connection with the particular claim of privilege or immunity under consideration.

[13] Currently pending before the Court is another case involving Rule 501, *Trammel* v. *United States*, cert. granted, No. 78-5705 (Feb. 26, 1979).

guidance to the proper resolution of the question presented by this case. See H.R. Rep. No. 93-650, *supra*, at 8; H.R. Conf. Rep. No. 93-1597, *supra*, at 8; 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate). See also 2 *Weinstein's Evidence* ¶ 501[02], at 501-17 to 501-18, 501-20.5 (1979).

In addressing various claims of privilege, the Court has repeatedly reaffirmed the seminal principle that "'the public * * * has a right to every man's evidence.'" *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688; *United States* v. *Nixon*, 418 U.S. 683, 709 (1974). See also *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), slip op. 20; *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. 1961). Because testimonial privileges preclude the use of highly relevant evidence and therefore tend to be "an obstacle to the administration of justice," Wigmore, *supra*, at 73; see *United States* v. *Nixon*, *supra*, 418 U.S. at 711-713, such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests." *Id.* at 709. See also *Herbert* v. *Lando*, *supra*; *Elkins* v. *United States*, *supra*, 364 U.S. at 234 (Frankfurter, J., dissenting); *United States* v. *Bryan*, *supra*.

For example, in *Clark* v. *United States*, 289 U.S. 1 (1933), the defendant, who had previously served on a federal jury in an allegedly corrupt fashion, claimed a privilege as to her vote and deliberations as a juror. The unanimous Court, in an opinion by

Mr. Justice Cardozo, concluded that although "the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity," *id.* at 16, nonetheless the administration of justice required the admission of this highly probative evidence at a federal criminal trial. In a passage highly relevant to respondent's claim of privilege, the Court elucidated as follows (*id.* at 14):

> Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the [defendant], if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[14]

This cautious, indeed hostile, approach to the creation and application of evidentiary privileges is also reflected in *United States* v. *Nixon, supra.* That case arose out of the President's claim of absolute privilege regarding all confidential communications between himself and his aides. The Court acknowledged the President's substantial need to discuss the affairs of state with his aides in confidence. 418 U.S. at 705-708, 711-713. The Court further recognized

[14] See also Proposed Rule of Evidence 507, 56 F.R.D. 183, 249 (1972), which provided that the privilege regarding the casting of ballots would be inapplicable to an illegally cast ballot.

that the Executive's claim of privilege had constitutional underpinnings in Article II of the Constitution and in the doctrine of separation of powers. *Ibid.* Nonetheless, the Court unanimously rejected the claim of privilege (except when based on military or diplomatic secrets) because "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts * * *." *Id.* at 709.

More recently, the Court has declined to create a new testimonial privilege emanating from the First Amendment. In *Herbert* v. *Lando, supra,* a television news editor contended that he was constitutionally entitled to refuse to testify regarding the exercise of his editorial judgment in preparing an allegedly libelous news show. The Court rejected this claim, noting that "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Slip op. 20 (footnote omitted).[15] Similarly, the Court has previously concluded that the First Amendment does not grant reporters a testimonial privilege regarding their confidential news sources, at least where withholding such information would impede the administration of criminal justice. *Branzburg* v. *Hayes, supra.*

[15] We further note that the claim of privilege addressed in *Herbert* v. *Lando* arose in a civil context, whereas here the government seeks to use evidence of respondent's legislative acts in a criminal trial. See *United States* v. *Nixon, supra,* 418 U.S. at 712 n.19; cf. *United States* v. *Reynolds,* 345 U.S. 1, 12 (1953).

In sum, the federal common law strongly disfavors the creation of new evidentiary privileges (or the expansion of existing ones), even when the proposed privileges involve confidential communications and implicate constitutional principles. As the Court stated in *United States* v. *Nixon*, *supra*, 418 U.S. at 710: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Because, as we demonstrate below, the admission of a state senator's public legislative acts in a federal criminal trial implicates neither the principles that inform the speech or debate privilege nor the mandates of federalism, the court of appeals erred in recognizing a new state legislator's privilege. See *Gravel* v. *United States*, 408 U.S. 606, 627 (1972); *Clark* v. *United States*, *supra*.[16]

B. The Policies Informing The Speech Or Debate Clause And The History Of Legislative Privilege Do Not Support Creation Of A Federal Evidentiary Privilege On Behalf Of State Legislators

Although the Speech or Debate Clause does not control this case, the court of appeals did not err in looking to the history and purposes of that constitutional provision to aid in the resolution of the issue posed by this case. We cannot agree with the court of appeals, however, that "the long history and the felt

[16] In *Gravel* the Court refused to recognize a non-constitutional testimonial privilege for legislative aides over and above that provided by the Speech or Debate Clause.

need for protection of legislative speech or debate" (Pet. App. 15a), as reflected in this Court's Speech or Debate Clause cases, requires or even suggests the creation of a common law evidentiary privilege for state legislators.

The Speech or Debate Clause, like its English antecedents, is essentially and historically a source of legislative immunity. More recently, the courts have derived an evidentiary privilege from the Clause, but that privilege is inextricably linked to, and coterminous with, the immunity that is the focus of the Clause. Obviously, unless a state legislator is immune from any danger of imposition of federal criminal sanctions for his legislative acts, an evidentiary rule barring proof of such acts would have no rational purpose. Because, as we demonstrate in point 1, *infra*, respondent is not immune from federal criminal prosecution for his legislative acts, there is no logical or historical basis for creating a legislative privilege. *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring); Comment, *A Speech or Debate Privilege For State Legislators Who Violate Federal Criminal Laws*, 68 J. Crim. L. & Criminology 31 (1977) (hereinafter *"Speech or Debate Privilege"*). Furthermore, in point 2, *infra*, we show that the court of appeals' reliance on this country's tradition of legislative privilege is misplaced because respondent's claim of privilege does not implicate the separation of powers concerns that primarily underlie the Speech or Debate Clause.

1. *The federal common law does not recognize a legislative privilege akin to the Speech or Debate Clause in the absence of an underlying legislative immunity*

a. Neither respondent nor the court of appeals has contested that the Speech or Debate Clause (like other legislative privileges) is essentially a grant of immunity, and that the evidentiary privilege emanating from the Clause is derived from, and commensurate with, the underlying immunity. This implied concession is well warranted. The history of legislative privilege, which has been canvassed in considerable detail in the Court's opinions and elsewhere,[17] demonstrates beyond dispute that the privilege is primarily an "exemption from [both civil and criminal] prosecution." *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808),[18] and not an evidentiary privilege. As the Court explained in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975), although a "central role" of the Clause is to establish congressional immunity against Executive intimidation, the Clause also "provides protection against civil as

[17] See generally *United States* v. *Johnson*, 383 U.S. 169, 178-183 (1966); *United States* v. *Brewster*, 408 U.S. 501, 507-521 (1972); C. Wittke, *The History of English Parliamentary Privilege* (1921); R. Reinstein & H. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1120-1144 (1973) (hereinafter "*Separation of Powers*").

[18] The *Coffin* case has been cited with approval by the Court on several occasions. *E.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13; *Kilbourn* v. *Thompson*, 103 U.S. 168, 203 (1880).

well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." See also *Doe* v. *McMillan*, 412 U.S. 306, 312-315 (1973); *Gravel* v. *United States*, 408 U.S. 606, 621 (1972); *United States* v. *Brewster*, 408 U.S. 501, 507 (1972); *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82, 84-85 (1967).

Indeed, prior to the 20th Century, the reported decisions in both this country and England pertaining to legislative privilege involve only questions of immunity and not questions of evidentiary exclusion. See, *e.g.*, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Coffin* v. *Coffin*, *supra*; *Bradlaugh* v. *Gossett*, 12 Q.B.D. 271 (1884); *Ex parte Wason*, 4 Q.B. 573 (1869); *Stockdale* v. *Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839).[19] See generally *Separation of Powers*, *supra*, note 17, 86 Harv. L. Rev. at 1123-1133; C. Wittke, *The History of English Parliamentary Privilege* (1921); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk U. L. Rev. 1, 6-13 (1968). The comparatively recent development of an evidentiary privilege associated with the Speech or Debate Clause has merely followed the scope of the immunity. Where the act in question is immune, it is also privileged. And where there is no

[19] A similar focus is reflected in the decisions of the other commonwealth countries. See *Regina* v. *Bunting*, 7 Ont. Rep. 524 (1885). See also *Dillon* v. *Balfour*, 20 L. Rep. Ir. 600 (1887).

immunity, there is no derivative protection in the form of a privilege against proof of the act. See generally Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 Yale L. J. 1280 (1979) (hereinafter "*Evidentiary Implications*").

For example, in *United States* v. *Johnson*, 383 U.S. 169 (1966), the federal government prosecuted a Congressman for violating the conflict of interest statute and for conspiring to defraud the United States. The prosecution arose out of a scheme in which, in exchange for money, Johnson attempted to influence the Department of Justice to dismiss pending indictments against various financial institutions. The government's case included proof of a speech by Johnson on the floor of the House and also Johnson's discussion with Justice Department officials. The Court held that the latter evidence was admissible because the Speech or Debate Clause does not immunize "conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

The *Johnson* Court concluded, however, that the prosecution's introduction of Johnson's speech and its cross-examination of Johnson and others regarding his motivation for delivering that speech violated "the policies which underlie [the Clause]," and that therefore such evidence was inadmissible. *Id.* at 177. Mr. Justice Harlan, writing for the Court, first noted that the government's inquiry into the Congressman's speech was central to the conspiracy charge. *Id.* at 177, 184. After tracing the history of the Speech or

Debate Clause, the opinion then summarized the primary purpose of the legislative immunity provided by the Constitution: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is [a means] for ensuring the independence of the legislature." *Id.* at 179. Because, as Mr. Justice Harlan explained, the *Johnson* prosecution contravened this prophylactic purpose behind the legislative privilege, the government was constitutionally barred from inquiring into the contents of, and the motivation for, Johnson's speech. *Id.* at 180-185.[20]

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[20] Similarly, the English courts have construed the privileges of Parliament (Article 9 of the English Bill of Rights, 1 Will. & Mar. Sess. 2, ch. II (1688)) to constitute an evidentiary privilege as well as a source of civil and criminal immunity. But, as evidenced by the decision in *Church of Scientology* v. *Johnson-Smith*, [1972] 1 Q.B. 522, the evidentiary privilege thus created is also clearly derived from, and commensurate with, the underlying immunity. The *Church of Scientology* case arose out of a Member of Parliament's alleged libelous comments on a news program. In order to show malice, the plaintiff sought to introduce into evidence a speech regarding the Church of Scientology that the defendant had delivered in Parliament and that had subsequently been reported in the official debates (Hansard). The Attorney-General, acting as *amicus curiae*, argued as follows (*id.* at 524-525):

> A Member of Parliament cannot be sued directly for what he says in Parliament nor should he be challenged in any other proceedings. If the conduct of a Member could be impeached by indirect proceedings the privilege of Parliament would be rendered ineffective. * * * If, as in the present case, a Member of Parliament is sued for defamation for what he had said outside Parliament then the inquiry in court must be limited to what had

Thus, the analysis in *Johnson* unequivocally demonstrates that the evidentiary privilege emanating from the Speech or Debate Clause is based upon, and commensurate with, the underlying immunity.[21] Where a Congressman's act, such as Johnson's speech, is immunized because of its legislative nature, evidence of that act may not be used to support a civil or criminal suit against the Congressman. Where, however, no immunity attaches to the Congressman's act, such as the overtures made by Johnson to the Department of Justice, no testimonial privilege regarding those acts arises. See also *Gravel* v. *United States*, *supra*, 408 U.S. at 618, 622, 626-629; *United States* v. *Helstoski*, *supra*, slip op. 11; cf. *Hutchinson* v. *Proxmire*, No. 78-680 (June 26, 1979), slip op. 11-21.

The reason for this congruence between immunity and privilege may readily be discerned. Evidence of

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been said outside Parliament. Therefore if he repeats verbatim what he had said in Parliament he could still only be sued for what he had said outside Parliament.

The court held the evidence inadmissible, expressly accepting the argument of the Attorney-General that the evidence must be excluded as a means of fully protecting the privilege of Parliament. *Id.* at 528-529. See also *Roman Corp.* v. *Hudson's Bay Oil & Gas Co.*, [1971] 2 Ont. Rep. 418, 419-423, 18 Dom. L. Rep. 3d 134, 135-139 (Ont. H.C.), aff'd, [1973] Sup. Ct. Rep. 820, 36 Dom. L. Rep. 3d 413 (S. Ct. Can.); *Rex* v. *Boston*, 33 Commw. L. Rep. 386 (Austl. 1923); Mummery, *The Privilege of Freedom of Speech in Parliament*, 94 L.Q. Rev. 276, 283-284 (1978); cf. *Dingle* v. *Associated Newspapers Ltd.*, [1960] 2 Q.B. 405.

[21] "The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence." 383 U.S. at 176.

legislative acts may not be adduced in a prosecution of or suit against a Congressman in order to guard against the danger that liability will be imposed on account of such acts or that the Congressman will feel compelled in defending himself to explain and justify those acts before the judiciary. In essence, the evidentiary privilege affords prophylaxis against a possible breach of legislative immunity.[22] But if in a particular proceeding there is no immunity, and liability could be imposed for legislative acts, then it would be utterly senseless to continue to recognize an evidentiary privilege designed to shelter a nonexistent immunity. See *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring).

b. The court of appeals asserted that recognition of a legislative privilege is strongly indicated by this Court's Speech or Debate Clause jurisprudence (Pet. App. 8a-15a). The court's analysis is fundamentally flawed, however, because a state legislator has no immunity from federal criminal prosecution; consequently, neither logic nor precedent supports respondent's claim of privilege. The court of appeals

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[22] The Speech or Debate Clause by its terms also contains a testimonial privilege barring the direct questioning of a Congressman regarding legislative acts—a privilege that presumably would apply even when there is no possibility of imposition of liability for such acts (as when the Congressman is called as a witness in a proceeding to which he is not a party). That aspect of the privilege is not pertinent to the question in the present case whether in a criminal trial the prosecution may introduce evidence of legislative acts, by means other than direct questioning of the legislator, to show the existence of an extortionate scheme.

failed to consider this proposition or to recognize its telling impact upon the proper disposition of the issue posed by this case.

It is well established that a federal common law immunity shields state legislators acting in their official capacity from monetary liability under the Civil Rights Act, 42 U.S.C. 1981-1985.[23] See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, *supra*, slip op. 11-14; *Tenney* v. *Brandhove*, 341 U.S. 367 (1951).[24] But even with regard to civil proceedings, the official immunity accorded state legislators falls short of the immunity provided federal Congressmen by the Speech or Debate Clause. See *Speech or Debate Privilege*, *supra*, 68 J. Crim. L. & Criminology at 51-54; *In re Grand Jury Proceedings*, 563 F.2d 577, 581-582 (3d Cir. 1977); *id.* at 587 (Gibbons, J., concurring); *United States* v. *Craig*, *supra*, 528 F.2d at 782 (Tone, J., concurring). Thus, the Speech or Debate Clause bars injunctive

[23] Judges and prosecutors also share in this absolute official immunity. See *Stump* v. *Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors). See also *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Yaselli* v. *Goff*, 275 U.S. 503 (1927) (per curiam), aff'g 12 F.2d 396 (2d Cir. 1926); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). A state is, of course, free to provide such immunity from state liability if it sees fit to do so. *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, *supra*, slip op. 12-13.

[24] *Lake Country Estates* and *United States* v. *Brewster*, *supra*, 408 U.S. at 516 n.10, make clear that the recognition of legislative immunity in *Tenney* was based on federal common law and not the Speech or Debate Clause.

actions against Members of Congress acting in their official capacities. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, *supra*; *Powell* v. *McCormack*, *supra*, 395 U.S. at 501-506; *Dombrowski* v. *Eastland*, *supra*. State legislators, on the other hand, are apparently amenable to suits seeking injunctive relief under federal law despite their official immunities. *Eg.*, *Jordan* v. *Hutcheson*, 323 F.2d 597, 601-602 (4th Cir. 1963); *Liveright* v. *Joint Committee of the General Assembly of the State of Tennessee*, 279 F. Supp. 205 (M.D. Tenn. 1968); see *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Denny* v. *Bush*, 367 U.S. 908, aff'g 191 F. Supp. 871 (E.D. La. 1961). Cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.8 (1975) (injunction against state judges and prosecutor who are covered by absolute common law immunity).[25]

More important, this Court has repeatedly asserted in unequivocal terms that common law official im-

[25] The comparison between *Bond* v. *Floyd*, *supra*, and *Powell* v. *McCormack*, *supra*, is particularly instructive on this point. *Bond* involved a suit brought by Julian Bond against various Georgia state legislators for their refusal to allow Bond to take his oath of office and sit as a legislator. The Court held that Bond had been unconstitutionally deprived of his office and granted him injunctive relief against the individual legislators. In *Powell*, the Court also held that the plaintiff, a federal Congressman from New York, had been unconstitutionally deprived of his legislative office. The Court concluded, however, that only the House Sergeant-at-Arms and other House employees were amenable to suit and that, because of the Speech or Debate Clause, no injunctive relief was available against the individual Congressmen. Although the Court cited *Bond* in *Powell* with regard to the merits, see 395 U.S. at 513 n.35, there is no suggestion in *Powell* that *Bond* was improperly decided because of legislative immunity.

munity such as that recognized in *Tenney* v. *Brandhove, supra,* does not extend to criminal liability. For example, in *Gravel* v. *United States, supra,* the Court rejected a claim that the doctrine of official immunity protects a federal legislator and his aide from criminal liability or investigation with regard to acts that were not entitled to Speech or Debate Clause protection but were arguably within the purview of the legislator's official immunity. 408 U.S. at 627. The Court explained that "we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute" (*ibid.*).

That a state legislator's official immunity does not provide him with immunity from federal criminal liability is further evinced by the decision in *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). In that case, various individuals filed a class action against officials of the State of Illinois, including judges and prosecutors, claiming that the defendants' operation of the criminal justice system had deprived and would continue to deprive plaintiffs of their civil rights. *Id.* at 490-493. The Court ordered the complaint dismissed, concluding that plaintiffs had neither alleged a justiciable controversy nor stated a sound basis for equitable relief. *Id.* at 493-504. The Court explicated the latter point as follows (*id.* at 503; emphasis added):

> Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights * * * must take account of 18 U.S.C. 242 * * * Whatever may be the case with respect to civil liability generally * * * *we have never held that the performance of the duties of* judicial, *legislative,* or executive *officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights.* * * * *On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress* * * *."

Similarly in *Imbler* v. *Pachtman,* 424 U.S. 409, 429 (1976), the Court reiterated that:

> [T]he policy considerations which compel civil immunity for certain governmental officials [do not] place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 * * *.

Indeed, the decisions in *O'Shea* and *Imbler* strongly suggest that the federal civil immunity accorded state legislators has been "recognized at least partly because the availability of criminal sanctions * * * affords alternative protections [against corrupt state legislators]." *In re Grand Jury Proceedings, supra,* 563 F.2d at 587 (Gibbons, J., concurring).

Moreover, this distinction between civil and criminal liability appears well-founded. See *Speech or Debate Privilege, supra,* 68 J. Crim. L. & Criminology at

47; Note, *The Bribed Congressman's Immunity From Prosecution*, 75 Yale L.J. 335, 344-345 (1965); *Daniels* v. *Kieser*, 586 F.2d 64, 69 (7th Cir. 1978), cert. denied, No. 78-1221 (Apr. 30, 1979); *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1118-1119 (E.D. La. 1970). Any person can file a civil suit for damages in an attempt to harass or intimidate a legislator.[26] In contrast, federal criminal prosecutions may only be instituted by the Department of Justice

[26] As Judge Learned Hand explained in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. *There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.* [Emphasis supplied.]

At least one commentator has suggested that fear of private civil suits was the primary motivation for the adoption of speech or debate clauses by the states. See Field, *The Constitutional Privileges of Legislators*, 9 Minn. L. Rev. 442, 443 (1925).

and are subject to a "wide range of procedural protections for the accused, including indictment by grand jury [and] trial by jury under strict standards of proof * * *." *United States* v. *Brewster*, *supra*, 408 U.S. at 520. Although irresponsible federal prosecutors could file politically motivated charges against state legislators, there is no history of such abuses, which in any event are subject to review by Congress and the federal judiciary, as well as to critical scrutiny by the press. See *id.* at 522-523 n.16.

In sum, it seems clear that state legislators—like state judges, who also enjoy absolute immunity from civil suit for their judicial acts—are not immune from federal criminal liability for their legislative acts.[27] For example, if two or more legislators con-

[27] The federal government has in fact successfully prosecuted various state legislators for violations of federal law occurring in connection with the performance of their official duties. *E.g.*, *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *DiCarlo*, *supra*; *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Homer*, 411 F. Supp. 972 (W.D. Pa. 1976). See also *Anderson* v. *United States*, 417 U.S. 211, 214-215 (1974). Similarly, official immunity does not bar the federal prosecution of judges and prosecutors for their criminal, albeit official, acts. See, *e.g.*, *Braatelien* v. *United States*, 147 F.2d 888 (8th Cir. 1945); *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938); *United States* v. *Anzelmo*, *supra*, 319 F. Supp. at 1118-1119.

We further note that at least some states that have constitutional speech or debate provisions apparently permit prosecutions of state legislators based on legislative acts. See *Cox* v. *State*, 166 Tex. Crim. 587, 316 S.W. 2d 891 (1958); *People* v. *Logie*, 321 Mich. 303, 32 N.W. 2d 458 (1948); *State* v. *Ivanhoe*, 238 Mo. App. 200, 177 S.W. 2d 657 (1944); *Sims*

spire on the floor of the legislature to draft and introduce legislation for the purpose of depriving black persons of their civil rights, that conspiracy could be the res gestae of a prosecution under 18 U.S.C. 241 even though the indictment would be based on their legislative acts.[28] Similarly, if a state legislator introduced a bill that would damage certain private interests and then threatened to bring about its passage unless paid not to do so, his legislative act in introducing the bill could form the core of an extortion prosecution under the Hobbs Act.

If we are correct that the legislative acts of a state legislator enjoy no immunity from federal criminal prosecution comparable to those of a federal legislator, then no rational purpose is served by creating an evidentiary privilege against proof of such acts. This is doubly so where, as here, the federal government prosecutes a state senator for essentially non-legislative acts. See *Evidentiary Implications*, *supra*, 88 Yale L. J. at 1295-1297. Given the lack of underlying immunity and the nature of the charge, such a privilege would have no substantial tendency to protect legislative independence—the only societal interest conceivably supporting respondent's claim. This Court has never endorsed an evidentiary privilege

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v. *State*, 131 Ark. 185, 198 S.W. 883 (1917). Contra, *Blondes* v. *State*, 16 Md. App. 165, 294 A.2d 661 (Ct. Sp. App. 1972).

[28] Of course, the Speech or Debate Clause would immunize a similar conspiracy by federal Congressmen except to the extent it involved non-legislative acts. See *Ex parte Wason*, *supra*, cited with approval in *United States* v. *Johnson*, *supra*, 383 U.S. at 183.

(which by definition keeps highly relevant evidence from the jury) on such flimsy reeds. See *United States* v. *Nixon*, *supra*; *Clark* v. *United States*, *supra*; pages 20-24, *supra*.

c. Moreover, even assuming that state legislators do enjoy immunity from federal criminal prosecution directly based on their legislative acts, it does not follow that this Court should grant them the added benefit of a sweeping prophylactic evidentiary privilege comparable in scope to that under the Speech or Debate Clause. The Speech or Debate Clause is a constitutional directive prohibiting the questioning of a Congressman's legislative acts "in any other Place." The Clause itself therefore appears to constitute an evidentiary privilege as well as a source of immunity, and the Court has so applied the Clause in order to eliminate any possibility that a Congressman will be questioned or convicted on account of his legislative acts. See, *e.g.*, *United States* v. *Helstoski*, *supra*.

Respondent, on the other hand, at most relies on a common law immunity rather than the Constitution, and such immunities have never been construed as broadly as the Speech or Debate Clause. Compare *Powell* v. *McCormack*, *supra*, with *Bond* v. *Floyd*, *supra*. And at least where, as here, the government prosecutes a state legislator for non-immunized (*i.e.*, non-legislative) acts, and seeks to use evidence of his legislative acts only to corroborate other evidence of the defendant's clearly unprotected criminal conduct,[29]

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[29] Respondent's alleged extortion in connection with the extradition of a state prisoner and the introduction of legis-

extension of the official immunity to encompass an evidentiary privilege is unwarranted. Cf. *Doe* v. *McMillan*, *supra*, 412 U.S. at 320. The Court recognized an immunity in *Tenney* v. *Brandhove*, *supra*, in order to ensure legislative independence regarding bona fide legislative acts. In our view, it ignores "reason and experience" to suggest that a legislator —who *arguendo* is immunized from all direct civil and criminal liability for his legislative acts—will be chilled in the exercise of his legislative independence regarding bona fide legislative matters by the possibility that the federal government may use his legislative acts to prove his non-immunized, extra-legislative crime. See Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L.J. 335, 344-348 (1965).

2. The separation of powers doctrine that informs the Speech or Debate Clause does not support the recognition of a federal evidentiary privilege on behalf of state legislators

The court of appeals' analogy between a legislative privilege and the Speech or Debate Clause fails for still another reason. As we demonstrate below, the separation of powers doctrine is the seminal principle underlying the acceptance of legislative immunity in this country. Because the federal prosecution of a state senator does not implicate separation of powers concerns, the court of appeals' reliance on *United*

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lation are indistinguishable from the acts deemed non-legislative by this Court in *Johnson* and *Brewster*.

States v. *Johnson* and its progeny to create a new evidentiary privilege sets the holdings of those cases loose from their own explicitly stated rationale.

The Framers of our Constitution adopted the Speech or Debate Clause without substantial debate. See *Powell* v. *McCormack*, *supra*, 395 U.S. at 502. However, contemporaneous commentaries by members of the Constitutional Convention reflect the purpose that the Clause was intended to serve:

> [T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive.

8 *Works of Thomas Jefferson* 322 (Ford ed. 1904) (quoted in *United States* v. *Brewster*, *supra*, 408 U.S. at 548 (Brennan, J., dissenting)). See generally *id.* at 322-331. And James Wilson, a member of the committee that drafted the Clause, also wrote that the Clause was designed primarily to prevent a powerful executive from intimidating the legislators. See 2 *Works of James Wilson* 421 (McCloskey ed. 1967) (discussed in *Separation of Powers*, *supra*, note 17, 86 Harv. L. Rev. at 1139 & n.138). See also *The Federalist* No. 48 (J. Madison).

It is not surprising then that this Court has repeatedly confirmed that the Speech or Debate Clause was designed "to preserve the constitutional structure

of separate, coequal, and independent branches of government." *United States* v. *Helstoski*, *supra*, slip op. 13; see, *e.g.*, *Gravel* v. *United States*, *supra*, 408 U.S. at 616; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *United States* v. *Johnson*, *supra*, 383 U.S. at 178, 181-182. As the Court stated in *United States* v. *Brewster*, *supra*, 408 U.S. at 508 (footnote omitted):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

See also *Hutchinson* v. *Proxmire*, *supra*, slip op. 14; *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 6-7 & n.11; *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 502 & 511 n.17; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311 & 318 n.12; *id.* at 334 (Blackmun, J., dissenting). See generally *Separation of Powers*, *supra*, note 17.

That the separation of powers doctrine underlies the tradition of legislative immunity and privilege in this country is further reflected in the realities of

federal criminal prosecutions. Since it is the Executive which has generally unfettered discretion to institute criminal proceedings,[30] that branch of government needs no immunity from prosecution to protect its integrity and the balance of power between the coordinate branches. Similarly, the federal judiciary, which presides over all federal prosecutions, can as an institution protect itself from Executive overreaching by means of bad faith prosecutions of federal judges. The legislature, on the other hand, having enacted criminal laws of general application, is thereafter without direct power to protect its members against vindictive or politically motivated prosecutions.[31] The same relationships pertain, of course, in the states. Accordingly, it is the legislative branch that requires special immunity from criminal prosecutions based upon official legislative acts.

Since the adoption of legislative privileges in this country is inextricably linked to the separation of

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[30] See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 9-11; *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965) (only representatives of the Executive Branch may initiate prosecution). Moreover, the President possesses the pardon power.

[31] Of course, the legislature may ultimately protect itself to some extent by cutting off funds to the Executive, holding congressional inquiries, and rewriting legislation. That power cannot undo a prosecution, however. Furthermore, Congress often would not act to protect a particularly outspoken opponent of the Executive because of political alliances between the majority of Congress and the incumbent administration, and it is largely such individuals that the Clause was designed to protect.

powers doctrine,[32] the court of appeals' derivation of a legislative privilege for a state senator from the Speech or Debate Clause case law is sound only if the legislative privilege so created effectuates separation-of-powers objectives. But it is beyond dispute that "the separation-of-powers principle * * * has no applicability to the federal [government's] relationship to the States," *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976) (plurality opinion), much less to an individual state official of any branch of state government. The court of appeals' recognition of respondent's claim of privilege thus casts the concept of legislative privilege far adrift from its traditional legal moorings.

C. Admission Of Evidence Of Legislative Acts Of State Legislators In A Federal Criminal Trial Is Not Incompatible With A Due Regard For The Independent Functioning Of State Government

It has been suggested that the evidentiary privilege that respondent asks the federal courts to create on his behalf is compelled by "[p]rinciples of federal-state comity." *United States* v. *Craig*, *supra*, 528 F.2d at 779; see also Resp. Br. in Opp. 12. We submit, however, that neither principles of federalism embodied in the Constitution itself nor judicially evolved doctrines of comity justify the interference in the administration of federal criminal justice that would result from adoption of a state legislator's privilege in federal trials.

1. The Tenth Amendment undoubtedly places some limits on the exercise of the federal government's regulatory powers under the Commerce Clause with regard to the "integral governmental functions" of state and local governments. *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976).[33] But whatever the concept of "integral governmental functions" may encompass,[34] the instant prosecution (including the government's proposed evidentiary use of respondent's legislative acts) cannot fairly be described as "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

We note initially that the prosecution itself does not violate the Constitution. The courts have repeatedly upheld the constitutionality of Hobbs Act con-

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[32] Most states do not appear to extend the legislative privilege provided by state statutes and constitutions to legislative officials of subordinate jurisdictions such as county legislators and municipal councilmen or aldermen. See, *e.g.*, *McClendon* v. *Coverdale*, 57 Del. 568, 203 A.2d 815 (Super. Ct. Del. 1964); Prosser, *Torts* 782 (4th ed. 1971); 1 F. Harper & F. James, *The Law of Torts* 428-429 & n.6 (1956); cf. *Jacobs* v. *Underwood*, 484 S.W. 2d 855 (Ky. Ct. App. 1972) (common law did not grant privilege to municipal legislators; changed by statute).

[33] The Hobbs Act, 18 U.S.C. 1951, under which respondent is charged, is a statute enacted pursuant to Congress's power to regulate commerce. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 & 380 (1978).

[34] See Michelman, *States' Rights and States' Roles: Permutations of State "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977).

victions of corrupt state and local officials. See, *e.g.*, *United States* v. *Mazzei, supra; United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc) (Stevens, J.), cert. denied, 423 U.S. 837 (1975); see also *Perez* v. *United States*, 402 U.S. 146 (1971). Since the alleged conduct at issue in this case violates both federal and Tennessee law,[35] there is no basis for a claim that this prosecution interferes with a fundamental program of the State of Tennessee. Moreover, as the Court specifically pointed out in *National League of Cities*, Congress has significantly greater power under the Commerce Clause to regulate the actions of individuals than to regulate the essential actions of a State.[36] In *National League of Cities*, the Court held

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[35] See Tenn. Code Ann. § 39-802; see also §§ 39-3203, 39-3204 (1975). The district court, in a ruling not challenged here, held that allegations underlying one of the counts in respondent's indictment did not make out a violation of Section 39-802 because his alleged extortion regarding the extradition of a Tennessee prisoner did not come before him "in his official capacity." See A. 8-9. This conclusion seems at least superficially inconsistent with the court's subsequent conclusion that respondent's acts with regard to the extradition were privileged legislative acts. In any event, respondent's alleged attempt to interfere with the extradition violated the spirit if not the letter of Tennessee law. See *Williams* v. *State*, 34 Tenn. 160, 162 (1854) ("[Extortion] is the taking by color of an office, money or other thing of value, that is not due * * *.").

[36] See 426 U.S. at 845:

> It is one thing to recognize the authority of Congress to enact laws regulating individuals[s] * * * necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite

unconstitutional the federal government's attempt to regulate the wages of state employees because of the undue and direct interference with essential state functions occasioned by the statute in question. Here, in contrast, the government does not seek to interfere with the manner in which government organs of the State of Tennessee function, but rather is attempting to prosecute an individual state senator for his criminal acts. See also *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law * * *."); *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

Nor can there be any real question about the constitutional power of this Court to allow the federal government to use evidence in a federal criminal trial that would be privileged under state law. As detailed above, the Court has long recognized that questions of privilege in federal prosecutions are controlled by federal law regardless of applicable state privileges. See pages 17-19, *supra; Wolfle* v. *United States*, *supra*. Indeed, the rules of evidence as promulgated by this Court would not have recognized a legislative privilege even in diversity cases,[37] and there is little doubt that the application of such a general rule of evidence in the federal courts would be constitutional.

> another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

[37] See page 16, *supra*.

See *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965). Moreover, Congress has expressly determined that even where a state is itself a party to a case otherwise governed by federal law, "the privilege of a * * * government, State, or political subdivision thereof shall be governed by the principles of the [federal] common law * * *." Fed. R. Evid. 501. A fortiori then, the rejection of respondent's claim of privilege in a federal criminal trial does not violate the Tenth Amendment. See also *Bond* v. *Floyd*, *supra*.[38]

2. It remains to consider whether concerns of comity and federalism justify the decision below. The suggestion is that although the Constitution may not compel recognition of a legislative privilege, federal courts ought to defer to the state law of privilege at least with regard to state legislators. Such a claim must, however, surmount significant obstacles. To begin with, the proverbial demand for every man's evidence generally outweighs even claims of privilege based on (but not compelled by) constitutional rights. See *Herbert* v. *Lando*, *supra*; *Nixon* v. *United States*, *supra*; *Branzburg* v. *Hayes*, *supra*. See generally

[38] In *Bond* v. *Floyd*, the Court held that one state legislator could get injunctive relief against various other state legislators for their discriminatory, albeit legislative, acts. Apparently, neither the injunction nor the use of legislative acts offended the Tenth Amendment. *Bond*, of course, involved an exercise of federal power not arising under the Commerce Clause. But the Court's (or Congress's) power to determine the rules of evidence to be applied in federal criminal trials does not derive from the Commerce Clause either. See *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 n.17.

pages 20-24, *supra*. And here, the connection between claimed evidentiary privilege and vital state interests is quite attenuated.

We assume that, because the Tennessee privilege tracks the language of the Speech or Debate Clause, it would preclude admission of respondent's legislative acts in a state criminal trial.[39] Moreover, like the parallel provision found in the federal Constitution, the Tennessee legislative privilege effectuates the separation of governmental powers within the State of Tennessee. See generally Tenn. Const. Art. II, Secs. 1-2; *Moore* v. *Love*, 171 Tenn. 682, 685-687, 107 S.W. 2d 982, 983 (1937); *Richardson* v. *Young*, 122 Tenn. 471, 491-493, 125 S.W. 664, 667-668 (1910). Therefore, this prosecution, which does not affect the balance among the branches of the government of the State of Tennessee, does not implicate the policy animating Tennessee's privilege.

Even if Tennessee's policy of immunity for legislative acts were significantly rooted in concerns other than separation of powers, those concerns would not be sufficiently powerful to merit creation of a federal evidentiary privilege for its legislators. In the first

[39] We are unaware of any authoritative construction of Article II, Sec. 13 of the Tennessee Constitution. Cf. Comment, *Absolute Privilege in Tennessee*, 30 Tenn. L. Rev. 397, 405 (1963) (absolute civil privilege). Insofar as Tennessee, like some other states (see note 27, *supra*), would allow a state prosecutor to use such evidence, there is absolutely no basis for respondent's claim of privilege. We further note that the fact that at least some states apparently permit prosecutions of state legislators based on legislative acts militates strongly against the creation of a common law legislators' privilege.

place, there is no significant likelihood that federal prosecutions will chill legitimate legislative activities. See pages 38-40, *supra;* see also *Evidentiary Implications*, *supra*, 88 Yale L. J. at 1288, 1295-1297.[40] But beyond that, the judgment has already been made that, with due recognition of the value to state government of immunity for state officials performing critical functions, such immunity is nevertheless to be confined in the federal courts to civil cases. Thus, state judges and prosecutors, whose immunity stems from the same kinds of concerns about fostering uninhibited performance of critical governmental functions as does that of state legislators, are subject to federal criminal prosecutions implicating their performance of official duties. See discussion at pages 31-39, *supra*. Since the federal government bears essentially the same relationship to state legislators as it does to state judges or prosecutors (and, concomitantly, federal prosecutions of any of these officials pose the same kind of "threat" to the discharge of state governmental functions) there is no rational basis for affording legislators the benefit of a special evidentiary privilege or prosecutive immunity.

[40] The federal criminal law does not immunize a state senator's legislative acts. Therefore, even assuming that the possibility of federal criminal prosecution might chill bona fide legislative independence (but see Note, *The Bribed Congressman's Immunity From Prosecution*, 75 Yale L.J. 335, 343-345 (1965)), recognizing respondent's claim of privilege will not preclude federal prosecutors from intimidating state legislators and forcing them to bear the burdens of litigation. Acceptance of respondent's contention would undoubtedly make the government's task in prosecuting corruption cases involving legislators more difficult. But it is inconceivable that a legislator, who is substantially protected as to all liability under state law and civil liability under federal law, will fail to act or to speak his mind about bona fide governmental matters because the federal government's chances of convicting him, as opposed to indicting him, are somewhat improved.

Balanced against the extremely attenuated connection between respondent's claim of privilege and the federalism concerns underlying the Tenth Amendment are two weighty federal interests. First, there is a substantial federal interest in successfully prosecuting corrupt state officials. Both the Hobbs Act, 18 U.S.C. 1951(b)(2), and the Travel Act, 18 U.S.C. 1952, are specifically directed at extortion by, and bribery of, state officials, including state legislators. See, *e.g.*, *United States* v. *Mazzei*, *supra*, 521 F.2d at 643-645. See also 18 U.S.C. 1541 (prohibiting state officials from purporting to issue passports) and 1511(a)(2) (making obstruction of state criminal law enforcement by any state official a federal crime); see H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 52-53 (1970).[41] And second, there is the fundamental and comprehensive need of the criminal justice system to develop all relevant evidence. See *United States* v. *Nixon*, *supra*, 418 U.S. at 708-709. Although the demand for every man's evidence is implicated by all claims of privilege, it is especially compelling here, where use of the disputed evidence neither offends the

[41] In addition to using various laws that are expressly directed against official corruption, the federal government has prosecuted state legislators or other officials under the mail fraud and wire fraud statutes, 18 U.S.C. 1341, and 1343. See, *e.g.*, *United States* v. *Craig*, *supra*, 528 F.2d at 774.

Constitution nor interferes with a confidential relationship. To paraphrase Mr. Justice Cardozo, given these overriding federal interests, recognition of a legislative privilege would simply entail payment of too high a price for whatever minimal increment of serenity of mind a state legislator could arguably derive from such a privilege. See *Clark* v. *United States*, *supra*, 289 U.S. at 14.[42]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[42] Respondent's federalism argument is further belied by Congress's express determination that federal law governs the evidentiary privileges of a state-qua-state in a federal criminal trial. See Fed. R. Evid. 501.

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OCTOBER TERM, 1978

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Petitioner,

v.

EDGAR H. GILLOCK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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BRIEF FOR EDGAR H. GILLOCK

OPINION BELOW AND JURISDICTION

The Government has correctly cited the Opinions Below and has correctly stated the jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the necessity for protection of legislative speech or debate in a republican form of government requires a limited evidentiary privilege, excluding evidence of a state legislator's legislative acts in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

In addition to those constitutional provisions set forth in the Government's Brief, respondent would add Article IV, Section 4, of the United States Constitution.

> The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

COUNTER-STATEMENT

This case arises out of the federal prosecution of a Tennessee State Senator, Respondent Edgar H. Gillock, under the Hobbs Act (18 U.S.C. § 1951), the Travel Act (18 U.S.C. § 1952),[1] and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962), and the Government's appeal from a pre-trial order by the United States District Court for the Western District of Tennessee suppressing certain evidence proffered by the Government in that prosecution. The Trial Court's order has been affirmed, in substantial part, by the United States Court of Appeals for the Sixth Circuit, *United States* v. *Gillock,* 587 F.2d 284 (6th Cir. 1978), and the Government appeals from that ruling.

Although the Government has included a rather lengthy narrative of its view of the proof,[2] the resolu-

[1] The Travel Act Count, Count Two, was dismissed for failure to state an offense (Rule 12, Federal Rules of Criminal Procedure) and, consequently, is not before this Court.

[2] Senator Gillock has not had the opportunity to confront witnesses or present evidence in his own behalf and thus the recitation

tion of the issue in this case does not require reference to any fact other than whether the following evidence should be admissible in a federal criminal trial of a state senator:

1. The State Senator "made an official request in writing for an opinion from the [Tennessee] Attorney General concerning 'Extradition on a Misdemeanor.' . . ." (Pet. App. 43a).
2. The State Senator "participated in a hearing conducted by the Senate Judiciary Committee, of which he was a member in the Tennessee Senate" and an extradition officer in his role as a head of the Tennessee Law Enforcement Academy (a position different and distinct from his position as a hearing officer), appeared before the committee on a matter concerning the budget of the Tennessee Law Enforcement Academy. (Pet. App. 45a).
3. The State Senator "introduced Senate Bill Number 1783 . . . ." and sponsored successive bills and amendments. (Pet. App. 47a-48a). Moreover, the Government intends to introduce "[a]ny and all statements [which were] made by the defendant in support of the bill or bills, and the amendment thereto recorded in the normal course of business of the Tennessee General Assembly." (Pet. App. 48a).
4. The State Senator's vote to override the Governor's veto and "[a]ny and all statements made by the defendant in support of his motion to override the veto [which] were recorded in the normal course of business of the Tennessee General Assembly. . . ." (Pet. App. 49a).

in the statement is nothing more than an untested and generalized characterization of the Government's proof, in the light most favorable to the Government. Neither party has raised any factual issue relating to the Government's charges before this Court.

Having previously ruled that the respondent was not immune from federal prosecution by virtue of his status as a state legislator (A. 16-17), the District Judge granted his motion to suppress at trial the evidence of respondent's "legislative acts or motivation therefor." (Pet. App. 65a-74a). The basis for this ruling was the Court's recognition of the common law speech or debate privilege, enshrined in the Speech or Debate Clauses of both the United States and Tennessee Constitutions and equivalent in scope thereto, and the application of that privilege through Rule 501, Federal Rules of Evidence. The District Court specifically found that the protection afforded by that privilege

> is necessary, to paraphrase Chief Justice Berger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. . . . Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

(Pet. App. 73a)

Following an appeal therefrom by the Government, a remand from the Court of Appeals for specific findings on particular items of evidence (Pet. App. 56a-58a), a tender of proof by the Government (Pet. App. 39a-51a) and renewal of the motion to suppress, the District Court granted, on the same grounds, the motion with respect to each of the items of evidence described above, as well as several additional items. (Pet. App. 59a-64a). The District Court held that the scope

of this federal common law privilege was co-extensive with that guaranteed a federal legislator. (Pet. App. 59a-64a).

On the Government's second appeal, the United States Court of Appeals for the Sixth Circuit, with one Judge dissenting, affirmed the District Court's recognition in this case pursuant to the provisions of Rule 501. Tracing the "long history and felt need for protection of legislative speech or debate and the repeated and strong recognition of that history . . ." in cases decided by this Court, the Court of Appeals concluded that the District Judge was justified ". . . in his protection of that privilege." (Pet. App. 15a), *United States* v. *Gillock,* 587 F.2d 284, 290 (6th Cir. 1978).

In reviewing, under this Court's Speech or Debate Clause cases, the specific application of the protection to the facts at bar, the Court of Appeals likewise affirmed the District Court as to the items of evidence, set forth above, and reversed the District Court as to some items thus further limiting the scope of the privilege.

It is from the Court of Appeals' affirmance of the District Court's suppression of the evidence set forth above that the instant appeal by the Government is taken.

SUMMARY OF ARGUMENT

In what the United States Court of Appeals for the Sixth Circuit described as "the repeated and strong recognition" of "the long history and the felt need for protection of legislative speech or debate," *United States* v. *Gillock,* 587 F.2d 284, 290 (6th Cir. 1978), this Court has upheld the speech or debate protection

for federal legislators in both civil and criminal cases, *see United States* v. *Helstoski,* No. 78-349 (June 18, 1979); *United States* v. *Brewster,* 408 U.S. 501 (1972); *United States* v. *Johnson,* 383 U.S. 169 (1966), and for state legislators, indeed "regional legislators," in civil proceedings, *see Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* —— U.S. ——, 59 L.Ed.2d 401 (1979). Both the District Court and Court of Appeals below afforded that the same protection to the state legislator in this federal criminal prosecution in a natural, logical, and historically mandated extension of the foregoing holdings by this Court, grounded upon the same principles underlying those holdings.

The Government in this appeal seeks to have this Court carve out an exception to that time-honored principle, reaching back beyond our Constitution to the English Bill of Rights, which would wholly exclude *state* legislators charged in *federal criminal* prosecutions from the speech or debate protection. Although this Court has never decided the precise issue presented by the instant case, a wealth of precedent establishes the necessity for the privilege and its special value in our system of government.

Our opposition to the Government's unwarranted and draconian exception is in two parts. First, relying upon the decisions below and recent decisions of this Court, we contend that the speech or debate protection for state legislators in federal criminal cases not only exists, but has been recognized as essential in an unbroken line of decisions and, as such, is unquestionably an established part of the federal common law and, "interpreted in light of reason and experience," is applicable herein through Rule 501, Federal Rules of

Evidence. Second, we assert that, even apart from the operation of Rule 501, this legislative speech or debate protection occupies such an integral and hallowed place in our republican form of government, as a guarantor of legislative independence, that to abolish it in this context would do grave harm to the basic form of government we enjoy, the Constitution of the United States, and the concept of federalism. Thus, the fundamental protection upheld throughout our history and asserted in this case transcends Rule 501, both in concept and scope.

ARGUMENT

THE FUNDAMENTAL IMPORTANCE OF THE LEGISLATIVE SPEECH OR DEBATE PROTECTION IN GUARANTEEING THE INDEPENDENCE OF LEGISLATORS IN A REPUBLICAN FORM OF GOVERNMENT REQUIRES THAT EVIDENCE OF A STATE LEGISLATOR'S LEGISLATIVE ACTS BE EXCLUDED FROM EVIDENCE IN A FEDERAL CRIMINAL PROCEEDING AGAINST THAT LEGISLATOR.

1. The Long History Of This Court's Recognition Of Those Principles Embodied In The Speech Or Debate Protection Requires, Under Rule 501 Of The Federal Rules of Evidence, That A Legislative Privilege Be Applied So As To Bar Proof Of A Defendant State Legislator's Legislative Acts In A Federal Criminal Trial.

In light of the Government's characterization of the legislative protection asserted and upheld in this case, it is important to recognize at the outset that the protection at issue here is something more than an unfair advantage or a "privilege" for a single witness in a single case. Although a privilege may give an advantage to one party, and may even appear unfair in any particular case, the reason and experience of the law have

shown that in certain instances there are higher principles to be served than the right to every person's evidence. If a party is "protected by a constitutional, *common law* or statutory privilege," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (emphasis added), these private rights may benefit the party (including the Government) asserting the right, but the privileges are designed "not for their private indulgence but for the public good." *Tenney* v. *Brandhove*, 341 U.S. at 377; *see Roviaro* v. *United States*, 353 U.S. 53, 59 (1957) ("the informer's privilege is in reality the Government's privilege....").

The "public good," beginning before the English Bill of Rights, and carried over into the Articles of Confederation, the Constitution of the United States, and the Tennessee Constitution, has always recognized the broad principle that legislators ". . . shall not be questioned in any other place" for "any speech or debate" in the legislative body. This fundamental republican guarantee may be implemented through Rule 501 in the instant case, but the guarantee is based on certain essential tenets of our form of government. Thus, it is not difficult to refute the Government's denial of the very existence of this basic speech or debate protection; and this denial is the essence of the Government's position in this case.

The logical starting point in refuting the Government's claims in this case is the Opinion of the Court of Appeals, reported in *United States* v. *Gillock*, 587 F.2d 284 (6th Cir. 1978). Having noted the historical antecedents of the Speech or Debate Clauses in the United States and Tennessee Constitutions, the Court of Appeals initially concluded that neither the federal

clause (respondent is a state legislator)[3] nor the state clause (by virtue of the federal supremacy clause) was directly applicable. The Court then restricted itself to the question of whether the speech or debate privilege, equivalent to that of Article I, Section 6, United States Constitution, should be recognized under Rule 501. *Id.* at 285-86.

In deciding that question, the Court began with a careful review of the history of legislative speech or debate clauses, with particular emphasis on this Court's treatment of the protection embodied therein, applied that history "in light of the American experience, and in the context of the American constitutional scheme of government. . . ." *United States* v. *Gillock*, 587 F.2d at 288. Noting its disagreement with the Seventh Circuit, *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976), *cert. denied sub nom., Markert* v. *United States*, 425 U.S. 973 (1976) (Craig I); 537 F.2d 957 (7th Cir. 1976) *en banc* (Craig II), *cert. denied sub nom., Markert* v. *United States*, 429 U.S. 999 (1976), and with the First Circuit, *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), the Court correctly concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming [the] protection of the privilege in this case." *United States* v. *Gillock*, 587 F.2d at 290;

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[3] *But see Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, —— U.S. ——, 59 L.Ed.2d 401, 415 (Blackmun J., dissenting).

see In re Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977).

The rationale of the Court of Appeals is borne out by recent decisions of this Court. For example, in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* —— U.S. ——, 59 L.Ed.2d 401, 412 (1979), this Court noted "the central importance attached to legislative freedom in our Nation;" independent of any statute or constitution,[4] state legislators have well established rights based on this "Court's interpretation of *federal* [*common*] *law.*" *Id.* (emphasis added). This common law principle, *see* Rule 501, Fed. R. Evid. "equally applicable to federal, state and regional legislators," *id.,* is that:

[4] Forty-three of the states have specific proviisons in their constitutions protecting the speech or debate privilege. *See Tenney* v. *Brandhove,* 341 U.S. 367, 375 n. 5 (1951); Alaska Const. Art. II § 6; Hawaii Const. Art. III § 8. Two states, Iowa and North Carolina specifically provide for the speech or debate privilege by statute. Iowa Code § 2.23 (1967), Gen. Stats. N.C. § 120-9 (1974). In addition, California, Mississippi, Nevada and South Carolina provide for a privilege from arrest for legislators. *Tenney* v. *Brandhove,* 341 U.S. at 375 n. 5. Only Florida has no specific constitutional or statutory provision concerning legislative privilege but the courts may recognize a common law privilege in that state. *See City of Safety Harbor* v. *Birchfield,* 529 F.2d 1251, 1256 n. 8 (5th Cir. 1976).

The Government suggests that this Court could adopt a rule "as broad as, but not broader than, that available in the Courts of [a defendant's] state." (Pet. Br. at 20 n. 2) Although the scope of the privilege is not at issue in this case, and even if it were, the Tennessee constitutional privilege is at least as broad as the federal rule, it would appear that any rule other than a general rule of national applicability would not foster Rule 501's goal of creating a "uniform standard." Notes of the Committee on the Judiciary, H. R. Rep. No. 93-650, 93rd Cong. 2d Sess., 4 U.S. Code Cong. and Admin. News 7075, 7082 (1974).

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of the judgment against them based on a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a Court to inquire into the motives of legislators, has remained unquestioned.

Id. at 412-13 (citations omitted). This clear statement of the common law surely establishes beyond doubt that there is a "principle of the common law" which allows legislators in a democratic society the greatest possible freedom to do and say things in connection with legislation without fear of being sued, indicted, or otherwise intimidated. *Id.; Tenney* v. *Brandhove,* 341 U.S. at 372.

The Government has sought to obscure this fundamental principle by its good faith assurances and a convoluted distinction between "privilege" and "immunity," apparently adapted from *Craig II, supra.* The real question, therefore, is not whether the common law recognizes the legislative speech or debate principle, but whether it should be interpreted in light of reason and experience to give a limited evidentiary privilege, excluding legislative acts in a criminal prosecution. There exists today, as there has existed for centuries, a "felt need" for the privilege in order to protect the independence of the legislature. Our strong tradition

of legislative independence is founded on common law origins which rival any other privilege recognized in the law, and the privilege exists not for the benefit of any individual legislator, but in the interest of the due functioning of our legislative system.

These fundamental principles of the common law should be the focus of this appeal, and are addressed first in this brief.

A. The federal common law recognizes the state legislative speech or debate privilege.

The protection afforded by the speech or debate principle is no less important in individual states than it is in the federal system. Because of the various express provisions in most states and in the federal Constitution,[5] as well as over four hundred years of "reason and experience," this Court has not often been asked to look to the existence, *vel non,* of the common law speech or debate principle simply "because the tradition of legislative privilege is so well established in our polity." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966).

When this Court has considered this question in the past (and it has never considered this issue in the context of a federal criminal prosecution of a state legislator) there has been no doubt as to the existence of a federal common law speech or debate protection founded in the common law and sustained through centuries of "reason and experience." *Tenney* v. *Brandhove, supra; Lake Country Estates* v. *Tahoe Regional*

[5] *See* Note 4, *supra.*

Planning Agency, supra (extending a legislative privilege to "regional" legislators).

As this Court and other commentators have repeatedly noted, the speech or debate principle has its roots in English Parliamentary history where, as early as 1536, "the privilege of freedom of discussion was well recognized." Holdsworth, *A History of the English Law,* Vol. IV, p. 91 (Little, Brown & Co. 1938); *Tenney* v. *Brandhove, supra; United States* v. *Johnson, supra; United States* v. *Brewster, supra.*

After Peter Wentworth and others were sent to the Tower by Queen Elizabeth in 1587,[6] Parliament was harassed by successive monarchs and continued in its struggle with the Crown. In 1689 "[t]he various ways in which Charles II and James II had sought either to influence or to muzzle Parliament were dealt with by certain clauses in the [English] Bill of Rights [including the declaration] that freedom of speech and debate and proceedings in Parliament ought not be questioned in any court or place out of Parliament. . . ."[7] *Id.* at

[6] Wentworth and others had the audacity to sponsor the following rhetorical questions to Parliament:

> Whether this council be not a place for any member of the same here assembled, freely and without controllment of any person, or danger of laws, by bill or speech, to utter any of the griefs of this commonwealth whatsoever, touching the service of God, the safety of the prince and this noble realm? Whether that great honour may be done unto God and benefit and service unto the prince and state without free speech in this counsel, which may be done with it?

Holdsworth, *supra,* Vol. IV at 179.

[7] The Bill of Rights provided "[t]hat the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 Wm. & Mary Sess. 2, cap. 2; *Tenney* v. *Brandhove,* 341 U.S. at 372.

Vol. VI, 231. *Craig I,* 528 F.2d at 776. Subsequently, and as a result of the English experience,

> [f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.

Tenney v. *Brandhove,* 341 U.S. at 372; *see* Joseph Story, *Commentaries on the Constitution of the United States,* 307 (Boston, Hilliard, Gray and Co. 1833).[8] The "great and vital privilege" is freedom of speech and debate, "without which all other privileges would be comparatively unimportant, or ineffectual." *See* Tucker, *The Constitution of the United States,* 440 (Chi., Callaghan & Co. 1899). (The "precious privilege" prohibits a member from being "punished or questioned.")

On the basis of the universal acceptance of this principle, this Court has unmistakably identified the purpose of the common law speech or debate principle: "the reason for the privilege is clear;" it is that

[8] Story entertained no doubt as to the source of the clause, its relationship to the states, and its foundation in the common law:

> This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as a matter of constitutional right. In the British parliament it is a claim of immemorial right . . . it is always particularly demanded of the king in person by the speaker of the house of commons, at the opening of every new parliament.

Story, *supra* at 309.

> in order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that *he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.*

Tenney v. *Brandhove,* 341 U.S. at 373, *citing* II Works of James Wilson (Andrews ed. 1896) 38 (emphasis added). (Wilson, according to *Tenney,* 341 U.S. at 373, was "an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution.") Moreover,

> It is apparent from the history of the clause that *the privilege was not born primarily of a desire to avoid private suits* such as those in *Kilbourn* and *Tenney,* but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

United States v. *Johnson,* 383 U.S. at 180-81 (emphasis added). This privilege is essential so that legislators may "execute the functions of their office *without fear of prosecutions, civil or criminal.*" *Tenney,* 341 U.S. at 374 (emphasis added).

Accordingly, there can be no meaningful quarrel with our threshold proposition that the federal common law recognizes a speech or debate principle, which exists primarily to protect legislators from prosecution for legislative acts. The basis and necessity for the protection, and for the privilege, are as compelling today as in the days of the founding fathers; in between is an unbroken history of reason and experience, acknowledged repeatedly by the courts, which establishes both the privilege and the continuing need for it.

B. The government's argument that a state legislative speech or debate protection does not exist is contrary to the weight of experience and authority.

In the face of the foregoing authority, the Government seeks not merely to bar application of this protection in criminal cases, but to persuade this Court that there is no legislative speech or debate protection for state legislators, that such a protection is "unwarranted" and "unprecedented." Thus, the Government *assumes* throughout that the courts below created the privilege, rather than simply recognizing it. In order to substantiate that argument and to circumvent the plain thrust of this Court's decisions, the Government has chosen, first, to posit an interdependent relationship between "immunity" and "privilege" and, through a rather convoluted process, argue that there is no "privilege" here because there is no "immunity."[9] Second, the Government chooses the least likely of the possible underpinnings for the privilege, "separation of pow-

[9] To avoid confusion, this brief will refer to the common law speech or debate *principle* or *protection*, leaving aside the characterization of the effect of the principle as a "privilege" or an "immunity." The Government repeatedly asserts the immunity-privilege relationship. *See* Pet. Br. at 27-28 ("[w]here there is no immunity, there is no derivative protection in the form of a privilege against proof of that act."); Pet. Br. at 31, ("because a state legislator has no immunity from federal criminal prosecution . . . neither logic nor precedent supports" our claim of privilege.); Pet. Br. at 31, ("But if in a particular proceeding there is no immunity, and liability could be imposed for legislative acts, then it would be utterly senseless to continue to recognize an evidentiary privilege designed to shelter a nonexistent immunity."); Pet. Br. at 38, ("the legislative acts of a state legislator enjoy no immunity from federal criminal prosecution comparable to those of a federal legislator, . . . no rational purpose is served by creating an evidentiary privilege against proof of such acts.")

ers," and mightily demolishes it, leaving undisturbed the real reasons for the application of the privilege in this case. Finally, the government ignores the interest to be weighed in this case, and seeks to destroy the privilege on the basis of a "measured hostility" toward privileges in general. The arguments will be discussed *seriatim*.

(1) "Immunity," "Official Immunity," and the Speech or Debate Protection.

The main thrust of the Government's argument appears to be its syllogistic comparison of "immunity" and "privilege," apparently embracing the theory, first advanced by Judge Tone in dissent in *Craig I, supra,* that "[w]here there is no immunity, it would be incongruous, if not useless, to recognize an evidentiary privilege." 528 F.2d at 782.[10] *See* Pet. Br. at 26-40. In search of support for this theory, the Government has scoured English, Canadian and American jurisprudence to no avail, adding nothing of import to Judge Tone's position. In the process, it has carefully avoided the logical, legal and historical considerations which deprive this novel theory of substance.

As we understand the Government's argument, its premise is that there can be no legislative privilege without an underlying legislative immunity. Inasmuch

[10] Judge Tone based his theory on the premise that "[t]he privilege against disclosure and the immunity from liability should also be commensurate when the basis for protection is common law official immunity" and concluded that the existence of the privilege "depends on whether there is an underlying immunity." 528 F.2d at 782. *Compare, Craig I,* 528 F.2d at 781-84 *with* Pet. Br. at 26-40.

as a state legislator enjoys no immunity from federal criminal prosecution, so the argument goes, that state legislator likewise has no legislative privilege in a federal criminal prosecution.

As support for the premise, the Government turns to the federal Speech or Debate Clause and this Court's decision in *United States* v. *Johnson, supra,* arguing that the *Johnson* decision demonstates, indeed requires a conclusion, that the evidentiary privilege is based upon and commensurate with the immunity. This interpretation of the decision in *Johnson* is clearly incorrect. Rather than basing the decision on the co-existence of an immunity and therefore a privilege, as the Government argues, this Court clearly distinguished between the Speech or Debate Clause's effect on immunity, as opposed to the exclusion of evidence by virtue of the privilege required by that Clause. *Id.* at 176-77. Indeed, the Court expressly reserved the question that the Government maintains was decided.

> We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly

> drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

Id. at 184-85. Thus, the Court has drawn the very distinction that the Government asserts it obliterated. The point missed by the Government is that the Court held not only that evidence of legislative acts must be excluded under the Speech or Debate Clause, but also that *part* of the charge itself was barred by the Speech or Debate Clause because it was based on legislative acts. *Id.* at 185. Similarly, the speech or debate protection asserted and upheld in the instant case distinguishes between exclusion of evidence and the dismissal of charges, inasmuch as these charges are not *based* on legislative acts. In short, *Johnson* actually supports the assertion of the protection and the scope given it by the Court of Appeals below.

Not only is the Government's premise devoid of support, it is fundamentally unsound. First, it assumes that a federal legislator has no Speech or Debate Clause privilege unless there is a corresponding immunity from federal criminal charges. The Government's argument, therefore, proves too much because the absence of criminal immunity for a federal legislator, *United States* v. *Brewster,* 408 U.S. 501 (1972), compels the conclusion that a federal legislator has no speech or debate privilege, a conclusion diametrically opposite to that reached in *United States* v. *Heltoski,* No. 78-349 (June 18, 1979), and one which would require Article I, Section 6, to be read out of the Constitution. Second, without any further analysis, it begs the question posed in this case and pre-supposes that respondent would not be entitled to the protection afforded in *United States* v. *Johnson, supra,* if any of

the instant charges were *based* on legislative acts. Third, the Government's argument depends on the erroneous legal proposition that evidentiary privileges exist only by virtue of an equivalent immunity. This is a misconception of privileges in general [11] and of the speech or debate privilege in particular. The protection required by the speech or debate principle is articulated in terms of not being "questioned in any other place;" it is therefore something more than civil [12] or criminal immunity and something more than an evidentiary privilege. The privilege, exclusion, or bar, depending on the context, emanates from the speech or debate principle, a principle derived from the Anglo-American reverence for a republican form of government and the need to guarantee the independence of the people's legislative representatives.

[11] As examples of privileges not derived from immunities, *see Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Fifth Amendment); *Chinac* v. *Reinicker*, 11 Wheat 280 (1826) (attorney/client); *Blau* v. *United States*, 340 U.S. 332 (1950) (husband/wife); *Mullen* v. *United States*, 263 F.2d 275, 277-280 (D.C. Cir. 1958) (clergyman/penitent); *Zacker* v. *United States*, 227 F.2d 219, 226 (8th Cir. 1955) (recommendations to Attorney General as to litigation decision); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (unlawful searches and seizures).

[12] It is interesting to note that, in seeking to negate this broad protection by reliance on a perceived "measured hostility" to evidentiary privileges owing to the public's "right to every man's evidence," the Government relies heavily on decisions which did not address trial evidence and did not balance the same interests involved in this case, *see e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701-02 (1974); *United States* v. *Calandra*, 414 U.S. 338 (1974) (exclusionary rule of Fourth Amendment inapplicable in grand jury proceeding); *Lawn* v. *United States*, 355 U.S. 339 (1958) (grand jury entitled to consider evidence obtained in violation of defendants' Fifth Amendment privilege against self-incrimination); *Herbert* v. *Lando*, No. 77-1105 (April 18, 1979) (editorial privilege in discovery proceedings).

In other words, the Government's "immunity" premise misses the point which should be at issue here; for that issue is the existence, *vel non,* of a speech or debate protection according to the principles of the common law, and the Government is taking one of the "effects" of that protection and seeking to make it a "cause."

For these reasons, the premise of the Government's basic argument is irrelevant and falls of its own weight. Its following arguments, then, attempting to demonstrate that state legislators have no "immunity" from federal criminal prosecution and that they thus have no evidentiary privilege in such prosecutions are of no consequence. A word should be said, however, about the Government's insertion of the "official immunity" concept and its comparison of federal and state official immunity.

Craig II presumes to differentiate the common law principle applicable to state legislators and the protections of the federal clause by suggesting that federal legislators enjoy a greater protection from civil injunctions. Even the Government does not wholeheartedly embrace this argument and notes only that state legislators are "apparently amenable to suits seeking injunctive relief . . . despite their official immunities." (Pet. Br. at 33). The efforts to obtain injunctions against federal legislators have only recently been rebuffed. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975); *Powell* v. *McCormack,* 395 U.S. 486, 503 (1969); *Stambler* v. *Willis,* 415 F.2d 1365, 1368 (7th Cir. 1969), *cert. denied,* 399 U.S. 929 (1970). While it may be true that "once it is determined that members are acting within the 'legitimate legislative sphere' the speech or debate clause is an absolute bar

to interference" by a civil injunction, *Eastland* v. *United States Servicemen's Fund,* 421 U.S. at 503, the Government cannot possibly assume that federal legislators enjoy an absolute immunity from injunctions. "Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source," and the legislator may be enjoined when he steps outside the legislative sphere. *Id.* at 504 n. 15. *See United States* v. *American Telephone and Telegraph Co.,* 551 F.2d 384 (D.C. Cir. 1976).

The cases cited by the Government involving injunctions against state legislators do not suggest a different rule for state legislators. First, they were all decided prior to *Eastland* v. *United States Servicemen's Fund* and may well be subject to reversal under that case. Second, a careful examination of these cases discloses that different constitutional principles are involved for actions outside the "sphere of legislative activity" or where there is a conflict between federal constitutionally guaranteed rights and infringement of those rights by the legislature as an entire body. For example, in *Jordan* v. *Hutcheson,* 323 F.2d 597, 601 (4th Cir. 1963), and *Liveright* v. *Joint Committee of the State of Tennessee,* 279 F. Supp. 205 (M.D. Tenn. 1968), the federal courts were asked to enjoin state legislative investigatory subpoenas. Each court recognized that, as in *Eastland,* the legislative investigative power is not unbounded, and made the express determination that the matter sought to be enjoined was outside the sphere of legitimate legislative interests. In *Liveright,* Judge Miller implicitly recognized the federal common law speech or debate privilege. The Court applied *United States* v. *Watkins,* 354 U.S. 178 (1957), to determine the legitimate scope of the legislative privilege, and issued injunctive relief only after deciding that the defendant's actions were not within the privilege. *See Eastland* v. *United States Servicemen's Fund,* 421 U.S. at 503-07. *Jordan* v. *Hutcheson, supra,* turns on the same point. The Court states that

> the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights.

323 F.2d at 601.

Bond v. *Floyd,* 385 U.S. 116 (1966) and *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La), *aff'd sub nom. Denney* v. *Bush,* 367 U.S. 908 (1961) also involve extraordinary circumstances which warrant the interference of the federal system with state legislature as a body.

In *Bond* an injunction was directed by the federal court against the entire Georgia legislature, based on the legislator's right to be seated and take the oath of office. In *Bush* the action involves repeated, deliberate attempts by the legislature to thwart the desegregation of the Orleans Parish School Board in Louisiana.

None of these cases speaks to the issue of the application of a speech or debate privilege for an individual legislator. Upon close analysis, they display the restraint which courts have exercised in determining the scope of the privilege, and do not speak to the existence of the privilege. These cases all imply that there is a common law privilege, but that, as in the federal system, a court will not apply the privilege to those actions which are outside the scope of legitimate legislative activity.

If the Government's argument about immunity and privilege has any meaning at all, it must flow from Judge Tone's opinion that "the doctrine of official immunity leaves state legislators criminally liable under federal law for even their legislative acts." *Craig I,* 528 F.2d at 784; *see O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974) ("the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress....'" [13]

The validity of Judge Tone's opinion and the Government's derivative arguments rest on the erroneous assumption that there is a difference between the principles which inform the Speech or Debate Clause and the principles which support the common law speech or debate privileges. As we have amply demonstrated, *supra,* the various state and federal clauses merely codify one of the cardinal principles of the common law, and each continues to look to the common law for its definition, purpose and scope. *See Helstoski, supra; Brewster, supra; Johnson, supra.* Thus, if an immunity or a privilege arises under the clause, then it certainly applies with equal force to cases decided on the basis of federal common law.

Moreover, *Tenney* cannot be fairly limited to "official immunity." It is expressly grounded on those grand principles of legislative privilege which give life to the federal clause; and if *Tenney* had been a criminal case, these same principles would have justified an evidentiary privilege. Merely because *Tenney* did not ex-

[13] Official immunity does, of course, apply in some criminal actions, *see In re Neagle,* 135 U.S. 1 (1890).

pressly apply an evidentiary privilege (which would have been irrelevant in view of the civil immunity), is no basis for limiting the common law principle to civil cases.

Admittedly, there is a principle of law—official immunity—which insulates certain public officials from civil liability, *see, e.g., Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) (state executive officers); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976) (state prosecutors), and it is also clear that in establishing this principle

> the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens....

Doe v. *McMillan,* 412 U.S. 306, 320 (1973). If official immunity applies it "might not be the same for all officials for all purposes," and it applies to all "government officials of suitable rank." *Id.* at 319-20.

Civil official immunity is based on the principle that public officials—regardless of the particular arm of Government in which they serve—should be free from vexatious civil litigation in the performance of their official duties. *Doe* v. *McMillan, supra.* Legislators should of course be free from interference from many civil lawsuits; it would be patently absurd to permit civil actions against legislators on the basis of their vote on a particular matter.[14] However, with respect to legislators, a separate and distinct principle is involved.

[14] Or against judges for their decisions in particular cases, or against prosecutors for bringing certain cases.

As we have discussed previously, the rights of state legislators are derived from the nature of the legislature as an institution. In *Tenney* this Court was not primarily concerned with the interference of vexatious litigation or "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Barr* v. *Matteo,* 360 U.S. 564, 565 (1959); *Doe* v. *McMillan,* 412 U.S. at 319.[15] It could not be more clear from *Tenney* that the principal concern was whether our federal common law protects the state legislature itself as a political institution, so that this body might "support the rights of the people, by enabling their representatives to execute the functions of their office *without fear of prosecutions,* civil or criminal." 341 U.S. at 373-74, citing *Coffin* v. *Coffin,* 4 Mass. 1, 27, 3 Am. Dec. 189 (1808) (Emphasis added). Vexatious claims and rights of claimants which justify official immunity pale beside the important principles of the legislative speech or debate principle. *See Tenney, supra; Doe* v. *McMillan,* 412 U.S. at 324. (When defining official immunity

[15] The Government has not cited nor have we found any case which actually applies "official immunity" to a legislator. *See, e.g., Nixon* v. *Sirica,* 487 F.2d 700, 713 (D.C. Cir. 1973), *aff'd.,* 418 U.S. 683 (1974) (Presidential privilege); *United States* v. *Isaacs,* 493 F.2d 1124, 1144 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974) (Governor and State Director of Revenue); *United States* v. *Anzelmo,* 319 F. Supp. 1106 (E.D. La. 1970) (State Attorney General); *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974) (Magistrate of the County Court of Alexandria County, Illinois). In *Doe* v. *McMillan,* the legislators were all dismissed on the basis of the Speech or Debate Clause, and not on official immunity. 412 U.S. at 317-318. In *Tenney* there is no express reference to 'official immunity."

for a federal legislative employee, "[t]he scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.") *Cf. Barr* v. *Matteo,* 360 U.S. at 569 (although official immunity "has in large part been of judicial making, . . . the Constitution itself gives an absolute privilege to members of both Houses of Congress.")

Legislators do indeed have rights akin to official immunity, but they flow from a deeper source, and this deeper source has always recognized the need to protect a legislator against criminal prosecutions. Indeed, this common law principle will be drained of its meaning if it is restricted to the role of providing nothing more than a barrier to private suits by individuals.

(2) Separation of Powers.

As noted, the Government also contends that the separation of powers doctrine is the sole purpose for the Speech or Debate Clause and that this doctrine does not "support the recognition of a federal evidentiary privilege on behalf of state Senators." (Pet. Br. at 40-44)

Respondent certainly agrees that the Speech or Debate Clause is one of the checks and balances incorporated into the Constitution, and that it does in fact "preserve the constitutional structure of separate, coequal, and independent branches of government." *United States* v. *Helstoski, supra* at 13. However, separation of powers is neither the sole nor the "seminal" reason for the rule, and it obviously has no application in this case.

Irrespective of any check or balance, "throughout United States history, the privilege has been recog-

nized as an important protection of the independence and integrity of the legislature" to protect the legislature from the use of "criminal and civil law to suppress and intimidate critical legislation." *United States* v. *Johnson,* 383 U.S. at 178. Reason and experience have shown that the necessity for protection of the legislature stands by itself as sufficient justification for the rule; even though "[i]n the American government structure the clause serves the *additional function* of reinforcing the separation of powers so deliberately established by the Founders." *Id.* (emphasis added).

There is even a greater need for the privilege in prosecutions of state legislators by the federal government. Coordinate branches of the state or federal governments exercise their respective check on the other coordinate branches, since "[t]he Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." *Brewster,* 408 U.S. at 522 n. 16; *Gillock, supra.* Here, there is no check that state legislators may exercise when "the federal government as a whole is acting to punish an individual state legislator. . . ." (Pet. Br. at 14). *See Gillock,* 587 F.2d at 286. Surely reason and experience teach that the mere threat of this vast power, much less its exercise, will cause legislators to cower and refrain from the free and lively debates and actions which are envisioned in our scheme of government. And if the federal government does act, then this intrusion into the state legislature disturbs and threatens the balance of power within the state system.

For a state legislator, the lack of appropriate checks against the federal executive presents a much closer

analogy to the considerations which gave birth to the privilege in England. This privilege arose to protect members of Parliament who, like state legislators, had no other means of responding to "a hostile executive," be it the King or the federal government, *see Tenney* v. *Brandhove,* 341 U.S. at 372-74; *United States* v. *Johnson,* 383 U.S. at 178-79; *United States* v. *Brewster,* 408 U.S. at 507-09, and it is essential so that legislators may "execute the functions of their office without fear of prosecutions, *civil or criminal.*" *Tenney* v. *Brandhove,* 341 U.S. at 374 (emphasis added).

Finally, it would appear sufficient, in answer to the Government's argument that the absence of a separation of powers basis destroys a state legislator's speech or debate protection, to observe that the speech or debate protection upheld in *Tenney* and *Lake Country Estates* likewise had no basis in the separation of powers doctrine.

(3) The Common Law Does Not Reflect A "Measured Hostility" Towards Privileges.

We do not quarrel with the general proposition that a privilege precludes the use of obviously telling evidnce and that this may be important evidence for a decision by a fact finder in any particular case. It is beyond question that if privileges applied only to irrelevant evidence this Court would have little cause to consider such issues. However, the degree to which such evidence is excluded depends in part on the nature of the proceeding; *see* Note 12, *supra,* and is permitted when there is "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Elkins* v. *United States,*

364 U.S. 206, 234 (1960) (Frankfurter, J. dissenting). Therefore, it is inaccurate to suggest a "measured hostility" toward privileges unless there is a hostility toward the public good. We advance a simple argument in this case: the public good is best served by the recognition of a common law legislative privilege in criminal proceedings. The rationale for excluding the evidence is strongest where the admission of evidence might result in the imposition of a criminal sentence, *see United States* v. *Calandra,* 414 U.S. at 348, *Tenney* v. *Brandhove, supra,* and the exclusion of evidence of a state legislator's legislative acts is supported by four hundred years of reason and experience.

C. The conclusion must be drawn that the common law recognizes the speech or debate protection.

Accordingly, it is respectfully submitted that the decisions of this Court, as well as their historical antecedents, establish the existence of a speech or debate protection, and the principles underlying it are cognizable under Rule 501, Federal Rules of Evidence. It is further submitted that the Government's arguments in opposition to this well-entrenched legislative protection are logically unsound, but, more importantly, are directly contrary to the applicable decisional law. Simply stated, a refusal to recognize the fundamental legislative guarantee asserted in the case at bar would require this Court to turn its back on over four hundred years of Anglo-American history and an unbroken line of well-reasoned decisions upholding that protection. The significant issue presented for review in this case is not whether the speech or debate protection is recognized by the federal common law, but whether the speech or debate principle, "in light of

reason and experience," is somehow rendered inapplicable to state legislators in federal criminal prosecutions, although fully applicable to state legislators in federal civil cases. Although the unquestioning acceptance of speech or debate protection is some evidence of "reason and experience," there is additional support within the context of Rule 501 of the Federal Rules of Evidence and the similarity between state and federal legislators, each operating with their own sovereign government.

D. The federal common law speech or debate protection must be applied, through rule 501, in a federal criminal proceeding against a state legislator.

In determining whether there is any adequate basis for excluding state legislators in federal criminal proceedings from the protection of the common law speech or debate guarantee, it must be recognized at the outset that such an exclusion would be the only exception to application of that protection that this Court has ever made.

As noted above, the speech or debate protection has been applied, as to federal legislators under the Speech or Debate Clause, in both civil cases, *see, e.g., Eastland* v. *United States Servicemen's Fund, supra,* and criminal cases, *see, e.g., United States* v. *Helstoski, supra,* and, as to state legislators, and even "regional legislators," under federal common law, in civil cases, *Tenney* v. *Brandhove, supra; Lake Country Estates* v. *Tahoe Regional Planning Agency, supra.* Not only was the protection applied in those cases, it was applied broadly and with flexibility to accomplish the purposes underlying that protection. Thus, the protection was held to even bar part of one count of an indictment

in *United States* v. *Johnson,* since legislative acts constituted a necessary element of the charge contained in that count; but, in *Helstoski,* dismissal of charges was not necessary to preserve the Speech or Debate Clause principles and the protection was applied solely to exclude evidence of that federal legislator's legislative acts, in accord with the decisions in *United States* v. *Johnson, supra,* and *United States* v. *Brewster, supra.* It is this latter application, of course, that was upheld in the case at bar.

If the Court is to carve out an exception for state legislators in criminal cases, it could only be based on a determination that "[t]he scope of the privilege is limited by its underlying purpose." *Roviaro* v. *United States,* 353 U.S. at 60. And there must be a compelling reason, present in the instant situation, but absent in the above-cited situations, which requires that the balance here be struck wholly in favor of federal prosecution and wholly against the need for independence in the legislative houses of the States. The Government has brought forth no such reason and respondent respectfully submits that there is none, for it is manifestly clear that the principles underlying application of the speech or debate protection in all other situations are brought to bear with equal force here, and that the reason for the privilege in the first instance was to avoid criminal charges based on legislative acts.

The Government contends that the Speech or Debate Clause is fundamentally different from our federal common law claim, and that even if there is a common law criminal immunity for state legislators for their "direct civil and criminal liability for [their] legislative acts," it should not extend to the exclusion of

"corroborative evidence." (Pet. Br. at 39-40). Similar claims have been rejected in cases involving the Speech or Debate Clause, *see Helstoski, supra; Brewster, supra; Johnson, supra;* and there is no plausible rationale for stripping the common law speech or debate principle of the only meaningful protection which can be asserted. The federal clause is expressive of and codifies the federal common law, *see e.g., Miranda* v. *Arizona,* 384 U.S. at 442; and in a similar instance this Court acknowledged this close relationship:

> In *Tenney* v. *Brandhove* at issue was whether legislative privilege protected a member of the California Legislature. . . . The Court held a dismissal of the suit proper; it viewed *the state legislative privilege as being on a parity with the similar federal privilege.* . . .

United States v. *Johnson, supra* at 179-80 (emphasis added);[16] *see Lake Country Estates,* 59 L.Ed2d at 413 (the principle behind the privilege "is equally applicable to federal, state, and regional legislators."); *Imbler* v. *Pachtman,* 424 U.S. at 419 n. 15.

The admission of legislative acts as "corroborative evidence" renders the speech or debate principle meaningless, since there would be few if any prosecutions in which an imaginative prosecutor could not engineer the admissibility of legislative acts. Moreover, a similar argument was expressly rejected in *United States* v. *Helstoski, supra.* The only meaningful way to preserve

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[16] The "state legislative privilege" referred to in *Johnson* is not the federal privilege, nor could it have conceivably been a California state constitutional privilege, since California had no such provision. *Cf. Tenney,* 341 U.S. at 375.

the purpose of the speech or debate principle is to follow the precedent decided under the federal clause.

The historical development of the speech or debate principle does not distinguish between state or federal legislators; indeed, it prompts the conclusion that there should be no such distinction in the instant context. History demonstrates without contradiction that a limited evidentiary privilege, excluding evidence of legislative acts, is a reasonable accommodation between the requirements of legislative freedom and the interest of our society in prosecuting allegedly corrupt legislators.

Although the Government seeks to exaggerate the protection into gargantuan proportions, the better to attack it, the Court of Appeals held that the recognition of this common law speech or debate principle does not preclude prosecution of state legislators, but only that it affords a very narrow evidentiary privilege. The scope of the privilege is limited: it can be waived, *Craig I, supra; Craig II, supra;* it does not grant immunity to prosecution, *Brewster,* 408 U.S. at 515-17; and it only applies to acts associated with the legislative office, *id.; United States* v. *Johnson, supra.* Although the privilege "precludes any showing of how [a legislator] acted, voted or decided," *United States* v. *Brewster, supra* at 527, "an inquiry into the purpose of a bribe 'does not draw into question the legislative acts of the defendant member of Congress or his motives for performing them.' " *Id.* at 526 (citation omitted). *See United States* v. *Helstoski, supra.* Moreover, the Courts have even recognized that actions taken under color of legislative authority may not be privileged if the action is not legislative, *i.e.,* if the legislator is performing an executive or judicial function. *Tenney,*

341 U.S. at 378. In short, the federal government is not precluded in any sense from prosecuting; it must however restrict its proof to exclude "legislative acts." In other words, a delicate balance is struck which recognizes the competing interests; and the costs of protection for each respective interest is not too dear. If it appears that the federal government *can* (whether or not it will) use its criminal laws either punitively or negligently, then good men and women, who at personal sacrifice are not only willing to serve, but also willing to take the unpopular side of an argument, will be discouraged and lost from our system.

Reason and experience illustrate the error in the Government's factual assumption that when "the federal government as a whole is acting to punish an individual state legislator for a violation of federal law" (Pet. Br. at 14) and legislative acts are used in the prosecution "there is no significant likelihood that federal prosecutions will chill legitimate legislative activities." (Pet. Br. at 50). We simply ask this Court to consider not only "what has been, but . . . what may be." *Weems* v. *United States,* 217 U.S. 349, 373 (1910).

As the Court of Appeals pointed out, "[i]t is easy to conceive of the abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion," *Gillock,* 587 F.2d at 286. In the course of state legislative activities state legislators may justifiably provoke the ire of the federal government. If there is no check on the federal power other than the ultimate judgment of twelve jurors, the state legislator could be theoretically prosecuted and tried for the simple act of voting on a specific piece of legis-

lation."[17] The Government admits that "irresponsible federal prosecutors could file politically motivated charges against state legislators," but points to the lack of a "history of such abuses." (Pet. Br. at 37) For centuries it has been well understood that our system requires something more than good faith assurances by the Executive. *Cf. United States* v. *United States District Court,* 407 U.S. 297 (1972). In this situation, that "something more" is the speech or debate principle, and this principle merely sets a limit on the scope of inquiry into legislation and motivation therefor.

Good faith assurances are a dubious basis for an experiment with potentially disasterous effects. The potential damage need not be so dramatic as the change of a legislator's commitment for a particular vote on a

[17] A scenario which could give rise to a prosecution against an unpopular state legislator for purely legislative acts can be hypothesized. Suppose Senator A supports the Equal Rights Amendment, though hesitantly, from its inception and also receives a campaign contribution from a feminist organization. Senator A stands staunchly against a state ceiling on interest rates. Senator B favors a ceiling on interest rates and opposes the Equal Rights Amendment. Senator A and Senator B caucus: they decide that Senator A will vote against the Equal Rights Amendment if Senator B will vote against a ceiling on interest rates. Subsequently, and without solicitation from Senator A, an antifeminist group sends Senator A a campaign contribution. The Senators' fear of a prosecutorial intrusion into this process "could make them wary of making such compromises, and thus, chill a legitimate part of the legislative process." Note, *Evidentiary Implications of the Speech or Debate Clause,* 88 Yale L.J. 1280, 1286-87 n. 30 (1979). Moreover, if evidence of actual votes is permitted, Senator A might reasonably fear that proof of his prior votes in support of the Equal Rights Amendment, the feminist's contribution, the subsequent vote in opposition to the Equal Rights Amendment and the following campaign contribution "might form a chain of circumstantial evidence sufficient to ground a bribery prosecution." *Id.*

particular matter; it can be the insidious decline of the legislature as a separate and valuable arm of government. It is this creeping damage which can be caused by the hesitancy of individual legislators to act freely; and it will almost certainly result if there is unfettered discretion in the federal government to bring its awesome power to bear on any particular state legislator. *Cf. Boyd* v. *United States,* 116 U.S. 616, 635 (1886) ("It may be that it is the obnoxious thing in its mildest and lease repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.").

We submit that the federal and state principles are congruent. They each share the common genesis of a necessity to protect legislators from intimidation for actions taken in the course of their legislative function. A limited evidentiary privilege which excludes evidence of legislative acts, *United States* v. *Brewster,* 408 U.S. at 528, provides the only meaningful protection of the speech or debate principle, and the only certain device, to paraphrase *Brewster,* to apply the principle so as to insure the independence of the legislature without altering the historic balance of the federal/state relationship.

For these reasons, and the absence of countervailing reasons, it must be concluded that the federal common law speech or debate protection must be applied to this state legislator in this federal criminal proceeding and, as applied, requires the exclusion, under Rule 501, of those items of evidence found by the Court of Appeals to constitute legislative acts of the respondent.

2. Principles and Considerations Deeply Rooted In The Anglo-American Form Of Representative Democracy, The Concept Of Federalism, And In The Constitution, Require Recognition And Application Of The Speech Or Debate Protection In A Federal Criminal Prosecution Of A State Legislator.

There are certain principles and concepts which go to the very heart of the American democratic form of government. These principles and concepts found their way into the very choices made by the founding fathers when they shaped the Government we enjoy, and include the principle that there should be a division of sovereign power between the national government and the governments of the several states. Within each of these separate sovereigns is the "unique historical position" of this legislative protection, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 59 L.Ed.2d at 411 n. 24, *citing* Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1200 (1977), which requires an equally unique appreciation of its operation in this case. In short, the protection is so fundamental that it would be applicable even in the absence of Rule 501.

Lake Country Estates, which was decided after the Court of Appeals decided the instant case, recognizes and underscores the fundamental nature of the speech or debate protection. In rejecting petitioner's argument that legislative immunity should be limited to the federal and state level (and not applied to "regional legislators"), this Court first observed the historical roots of the legislative protection, saying,

> such immunity was consistently recognized in the common law and was taken *as a matter of course by our Nation's founders.*

Id. at 411 (emphasis added). Recalling the decision in *Tenney* v. *Brandhove,* 341 U.S. at 376, this Court said it

> reasoned that Congress, in enacting § 1983 as part of the Civil Rights Act of 1871, could not have intended to "overturn the *tradition of legislative freedom* achieved in England by Civil War and *carefully preserved* in the *formation of State and National Governments here.*"

Id. (emphasis added). Thus, this Court has recently confirmed the essence of our argument that the principles asserted herein are so fundamental that they underlie the Constitution itself and the very formation of American government. Consequently, as this Court further held, the protection does not owe its existence to any particular constitutional provision, statute, or rule; it is necessary for the public welfare. *Id.* at 412. Significantly, Lake Country Estates, the petitioner, had argued that the legislative immunity source was found in constitutional provisions, such as the Speech or Debate Clause, which had no application to "regional legislators;" and this Court's rejection of that argument is of seminal importance in the case at bar.

> We find these arguments unpersuasive. The Speech and Debate Clause of the United States Constitution is no more applicable to the members of state legislatures than to the members of TRPA. The States are of course free to adopt similar clauses in their own Constitutions, and many have in fact done so. These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in Tenney reflected the Court's interpretation of federal law; *the decision did not depend on the presence of a Speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures avail-*

> *able to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the "public good."*

Id. at 412 (emphasis added).

In the instant case, as in *Lake Country Estates,* it must be recognized that the legislative protection at issue is necessary for the public good, for reasons which go far beyond the strait-jacketed inquiry proposed by the Government. Respondent finds support for this concededly broad proposition, not only in the foregoing authorities, but in the Guaranty Clause of the Constitution, Article IV, Section 4, and in the Tenth and Eleventh Amendments to the Constitution.

For example, the Guaranty Clause requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government. . . ." Since the speech or debate protection is a prerequisite for an effective and independent legislature, the Government's attempt to invade this traditionally protected area would violate the principles underlying this clause and detract from a State's right to enjoy "a Republican Form of Government."

While it is not contended that the Guaranty Clause is a repository of any right asserted by this respondent,[18] it is contended that the guarantee of a Republican Form of Government impacts on the considerations

[18] Respondent is aware of the doctrine, established in *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849), that questions presented under this section are nonjusticiable, as "political questions," a doctrine left intact by this Court's reexamination of the "political question" doctrine in *Baker* v. *Carr,* 369 U.S. 186, 218-232 (1962). It is submitted, however, that reliance on the Guaranty Clause in this case clearly raises no political question and may properly be considered for these limited purposes.

at issue in this case and provides support for our argument that reason and experience support a speech or debate principle in criminal trials.

The Tenth and Eleventh Amendments likewise lend support to the overriding character of the speech or debate protection, in that the speech or debate principle is an integral aspect of sovereignty in our form of government, reserved by the Tenth Amendment and preserved, in pertinent part, by the Eleventh Amendment.

The Government's arguments have either ignored or avoided the impact of its position on state sovereignty. However, there is more at stake here than the rights of one legislator or the structural relationship of one coordinate branch of federal government to another. By surrendering its sovereignty to the federal government, each State placed its trust in the federal government and in the assumption that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514, 523 (1926). The overriding principle is that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White,* 74 U.S. (7 Wall) 700, 725 (1868). The due functioning of state government requires that our state/federal scheme of government must recognize this separate, "vital consideration,"

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. *Harris*, 401 U.S. 37, 44 (1971); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

The prosecution in this case is based on federal criminal statutes enacted pursuant to Congress' power to regulate commerce (Pet. Br. at 45); and wholly apart from principles of comity is the issue of whether the commerce power can be construed to limit the traditional freedom of State legislators.[19] The Tenth Amendment prohibits the exercise of Congressional power "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. 542, 547 n. 7 (1975), and interference with the due functioning of a state's legislature is certainly a factor which "impairs the state's integrity."

The speech or debate principle can only be asserted by a defendant legislator, but it is for the good of the legislature itself, and the legislature is certainly one of of the

> attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[19] In *Tenney*, the Court recognized that, irrespective of principles of good faith, there is a related issue as to the power of the federal government to restrict the rights of the state legislators: "[l]et us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. *That would be a big assumption.*" 341 U.S. at 376 (emphasis added). *See also Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency*, 59 L.Ed.2d at 415 (Blackmun J., dissenting in part).

National League of Cities v. *Usery*, 426 U.S. at 845.[20] Thus, the Tenth Amendment implies a healthy respect for the integrity of state institutions; and despite the affirmative grant of the commerce power, the federal government cannot destroy one of the "attributes of sovereignty" by denying speech or debate protection. Consequently, the Supremacy Clause does not require, under these circumstances, that a State speech or debate protection fall before the federal criminal statutes.

Accordingly, these foregoing policies, principles and considerations, wholly apart from and in addition to those principles which govern this Court's inquiry under Rule 501, require both that this Court recognize and confirm the existence of a speech or debate protection for state legislators in federal criminal cases and that it apply that protection in the instant case so as to exclude from evidence at trial the legislative acts of the respondent, thus affirming the decision of the United States Court of Appeals for the Sixth Circuit.

[20] Moreover, if the legislative branch of the federal government has "traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States," so that it "will not be deemed to have significantly changed the federal-state balance," *United States* v. *Bass*, 404 U.S. 336, 349 (1971), then surely the executive branch should be restrained from prosecuting an action which would utilize evidence which the state could not use, and which the Government could not use if a Federal legislator were being tried. *See Mapp* v. *Ohio*, 367 U.S. at 658 (state and federal governments should "respect the same fundamental criteria in their approaches.").

CONCLUSION

This decision of the Court of Appeals is correct and should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
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1. This case poses the question whether Rule 501 of the Federal Rules of Evidence encompasses an evidentiary privilege that bars the admission of evidence of a state senator's legislative acts in the context of a federal criminal prosecution. As we pointed out in our opening brief (Br. 20-24), the decisions of this Court reflect a purposeful unwillingness to create evidentiary privileges. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Respondent erroneously suggests that this substantial line of authority is irrelevant here because the decisions in question "did not address trial evidence and did not balance the same interests involved in this case" (Resp. Br. 20 n.12). To be sure, none of the decisions cited control the outcome of this case; nonetheless, they are instructive.

Thus, the Court has repeatedly rejected claims of privilege even when grounded in the Constitution itself. See, *e.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 705-708, 711-713 (claim of Executive privilege based on Article II and the separation of powers doctrine); *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), slip op. 20 (editorial privilege based on First Amendment); *Branzburg* v. *Hayes*, *supra* (journalist's privilege based on First Amendment). Moreover, the policy disfavoring the creation and expansion of evidentiary privileges is particularly strong in the context of a criminal prosecution. See, *e.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 712 n.19 (grand jury proceedings); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 685-691 (grand jury investigation or criminal trial); *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957) (criminal trial); *Clark* v. *United States*, 289 U.S. 1 (1933) (criminal trial). Accordingly, where, as here, the claim of privilege has no substantial constitutional underpinning[1] or other significant basis, there appears to be little justification for creating a rule that would withhold from the jury highly probative evidence of respondent's alleged criminal acts.

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[1]Respondent admits (Br. 8-9) that the Speech or Debate Clause does not protect or apply to state legislators. Furthermore, we have previously addressed respondent's claim that the legislator's privilege implicates the Tenth Amendment (Br. 44-52). Respondent fails to explain why in the context of a federal prosecution a state legislator is entitled to a privilege not enjoyed by a state judge or a state executive or how a federal prosecution of an individual state senator for conduct violative of state law interferes with an essential state function. Indeed, respondent acknowledges that there is no history of politically motivated federal prosecutions (Br. 35-36).

Respondent also relies (Br. 40-41) on the Republican Form of Government Clause of the Constitution (Art. IV, Sec. 4) and the Eleventh Amendment. These contentions are frivolous. The former provision simply grants Congress the nonjusticiable power "to decide what government is the established one in a State [and] * * * to decide [whether a] contingency ha[s] happened which require[s] the federal government to interfere." *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42-43 (1849). Nothing could be further removed from the questions of evidence presented by this case. Indeed, one could as easily say, with regard to that provision, that federal prosecution of a corrupt state legislator in accordance with the congressional purpose underlying the Hobbs Act, 18 U.S.C. 1951, protects rather than undermines the republican form of government. Likewise, this prosecution does not implicate the Eleventh Amendment. In the absence of congressional authorization, the Eleventh Amendment bars individual citizens from suing a state-qua-state in federal court. It pertains neither to suits against individual state officials for their unlawful actions nor to suits by the federal government. See, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *United States* v. *Raines*, 362 U.S. 17 (1960).

2. Relying on *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), respondent asserts that the "federal common law recognizes a speech or debate principle" (Br. 10-15). Respondent thus seeks to gloss over the substantial differences between those decisions and the issue raised by this case. *Tenney* and *Lake Country Estates* establish only that a state legislator, while acting in his legislative capacity, enjoys an absolute *civil* immunity from damages actions arising under 42 U.S.C. 1983. See also *United States* v. *Brewster*, 408 U.S. 501, 516 n.10 (1972). Neither case suggests that, for example, an aggrieved plaintiff may not introduce evidence of legislative acts in a civil suit in order to prove a legislator's unlawful, non-legislative conduct. Moreover, the civil immunity recognized in *Tenney* and *Lake Country Estates* does not parallel the protection accorded federal Congressmen by the Speech or Debate Clause in still another respect: Whereas federal legislators may not be enjoined for their legislative acts, their state counterparts may. Compare *Powell* v. *McCormack*, 395 U.S. 486, 501-506 (1969), with *Bond* v. *Floyd*, 385 U.S. 116 (1966). See, *e.g.*, *Jordan* v. *Hutcheson*, 323 F. 2d 597, 601-602 (4th Cir.

1963).[2] In sum, *Tenney* and *Lake Country Estates* do not support respondent's contention that a state legislator is entitled to an evidentiary privilege in the context of a federal criminal prosecution.

3. In our opening brief, we demonstrated that the evidentiary privilege associated with the Speech or Debate Clause exists only to protect the underlying immunity, and we accordingly argued (Br. 26-40) that where there is no underlying immunity, there is no justification for creating an evidentiary privilege. Respondent does not contend that he is immune from federal criminal liability. And although respondent asserts that there is no interrelationship between immunity and privilege, he neither cites any authority that has recognized an evidentiary privilege for legislators in the absence of an immunity regarding the legislative acts in issue[3] nor explains how the creation of

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[2]Respondent appears to suggest that this difference between civil immunity and Speech or Debate privilege is nonexistent (Br. 21-23). He fails, however, to distinguish *Powell* v. *McCormack*, *supra*, from *Bond* v. *Floyd*, *supra*. In both cases the question presented was whether a legislator had been unconstitutionally deprived of his seat. In *Powell*, the Court held that individual members of Congress could not be enjoined for wrongfully depriving Adam Clayton Powell of his seat. In contrast, the Court concluded in *Bond* that the individual state legislators should be enjoined from depriving Julian Bond of his position in the Georgia Lesiglature.

[3]Respondent erroneously suggests (Br. 18-19) that the Court reserved this issue in *United States* v. *Johnson*, 383 U.S. 169, 176-177 (1966). The passage quoted in respondent's brief states only that the Court has not addressed either a prosecution not involving legislative acts or a prosecution "entailing inquiry into legislative acts or motivations, [but] founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185.

such a privilege in the absence of an immunity advances the policies that underlie the tradition of legislative privilege.[4]

Finally, respondent's contention (Br. 19) that the government's position conflicts with the Court's decision in *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), is without basis. Our position is not based on any suggestion that a federal legislator who is properly indicted for non-legislative acts ceases to enjoy the evidentiary privilege associated with the Speech or Debate Clause. To the contrary, *Helstoski* and *United States* v. *Johnson*, 383 U.S. 169 (1966), make clear that, even in a wholly proper prosecution charging a non-legislative act, a Congressman may assert an evidentiary privilege. The privilege is limited, however, to those legislative acts that could not be the basis for an indictment and prosecution, even if such evidence is probative of the Congressman's non-legislative criminal

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[4]If a state senator has no federal criminal immunity, then he is subject to harassment, indictment, and trial by the hypothetical corrupt federal prosecutor notwithstanding the evidentiary privilege. Thus, insofar as the speech or debate privilege exists to protect a legislator from politically motivated prosecutions for legislative acts, recognition of respondent's claim of privilege serves little purpose. On the other hand, creation of a state legislator's privilege will interfere with the federal government's ability to convict corrupt state legislators.

In addition, respondent acknowledges (Br. 27-29) that his claim of privilege does not implicate the separation of powers doctrine that informs the Speech or Debate Clause. See, *e.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13; *United States* v. *Brewster*, 408 U.S. 501, 508 (1972); *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). He nonetheless argues that because a state senator is not a member of a coordinate branch of the federal government "[t]here is even a greater need for the privilege" (Br. 28). But a state senator's relationship to the federal government is no different from that of a state judge or a state executive and those state officials do not enjoy an evidentiary privilege similar to that sought by respondent.

conduct. The purpose is a prophylactic one to guard against any possibility that a Congressman could be punished on the basis of legislative acts. Thus, *Helstoski* and *Johnson* support our analysis, since even a federal legislator enjoys no evidentiary privilege regarding non-immunized (*i.e.*, non-legislative) acts. See also *Gravel* v. *United States*, 408 U.S. 606, 627 (1972). So too here, there is no reason to create an evidentiary privilege for acts as to which respondent enjoys no immunity.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979